

COMMENTS

PROMISING A BETTER FUTURE BUT DELIVERING DEBT: UNDERSTANDING THE FINANCIAL AND SOCIAL IMPACT OF FOR-PROFIT COLLEGES AND THE EFFECT OF THE NEW PROGRAM INTEGRITY RULES

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I. Introduction.....	632
II. For-Profit Post-Secondary Education: Origins and Practice	637
A. For-Profit Defined	637
B. Demographics	641
III. Material Misrepresentation	645
A. Marketing.....	647
B. Valuation of the Degree	651
C. Financial Matters	656
IV. Incentive Compensation Bans	659
V. Economic Impact of Fraudulent Misrepresentations by For-Profit Colleges	666
VI. Conclusion	669

“Education is the key to unlock the golden door of freedom.”¹
George Washington Carver (1864–1943)

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1. Proclamation No. 6827, 60 Fed. Reg. 49,491, 49,491 (Sept. 21, 1995) (President Clinton quoting George Washington Carver in a Presidential Proclamation of National Historically Black Colleges and Universities Week). President Clinton praised the Historically Black Colleges and Universities for their commitment to empowering the minority com-

I. INTRODUCTION

Krystle Bernal was guaranteed a better future by the admissions representatives at Westwood College.² They preyed on her desire to better her life, goading her into enrollment by “telling her that if she could not commit to Westwood, then she was not committed to improving her future.”³ Alisha Montgomery enrolled at Everest College after seeing a television commercial boasting a ninety percent placement rate and a promise that she would obtain medical certification upon program completion; several years after graduation she has neither a job nor certification.⁴ Recruiters from Everest College told Tierra Alexander the externship provided by Everest leads to a job almost one hundred percent of the time; but after Tierra completed the externship, the employer told her that they never hire Everest students because “they don’t have the right skills.”⁵ Chelsie Miller responded to an Everest advertisement and enrolled with assurances that classes would provide her with medical experience and that the credits would transfer to a pre-med degree at the University of Utah.⁶ Having obtained her degree from Everest, neither the University of Utah

munity and encouraging the American Dream. *Id.* The one hundred and three schools confer twenty-seven percent of the undergraduate degrees to Blacks in the United States, yet they only represent a mere three percent of the enrollment of all postsecondary institutions. *Id.*; cf. NAT’L CTR. FOR EDUC. STATISTICS, PROFILE OF UNDERGRADUATE STUDENTS: 2007–08, 60 (2010), available at <http://nces.ed.gov/pubs2010/2010205.pdf> (determining in Table 3.2 that 14% of college undergraduates are Black, yet Black students represent 24.8% of enrollment in for-profit colleges). This disparity highlights the significance minorities play in for-profit college enrollments.

2. Class Action Complaint at 23, *Bernal v. Burnett*, No. 1:10-cv-01917, 2010 WL 3940944 (D. Colo. filed Aug. 11, 2010). In addition, Ms. Bernal was informed that as many as ninety percent of graduates found a job within three-to-six months after graduating. *Id.* She was also led to believe that this high rate was due to Westwood’s contacts with those in the fashion merchandising industry. *Id.*

3. *Id.* Ms. Bernal enrolled in a three-year Fashion Merchandising program, at a quoted cost of \$45,000, with expectations of a \$65,000 salary. *Id.* After entering the program, Westwood increased tuition on multiple occasions, each time causing Ms. Bernal to make the decision: either complete the degree by taking out more loans, or abandon her academic pursuit while maintaining liability for loans already incurred. *Id.* at 24–25. Upon graduating with honors, Ms. Bernal’s student loan liability equaled \$75,000. *Id.* at 25.

4. Class Action Complaint at 17, *Montgomery v. Corinthian Colls., Inc.*, No. 10-ch-50281, 2010 WL 4815908 (Cir. Ct. Ill. filed Nov. 23, 2010).

5. *Id.* at 17–18. Tierra Alexander attended Everest based on promises contained in television advertisements. *Id.* at 17. After graduating in September 2008, Everest College “failed and/or refused to place Tierra Alexander in a job and she is not employed.” *Id.* at 18.

6. Complaint at 20, *Miller v. Corinthian Colls., Inc.*, No. 100918220, 2010 WL 4815908 (D. Utah filed Sept. 24, 2010). Even when confronted about the issue of transferring credits, Everest told her “the school was ‘fully accredited,’ and made express assurances that both her degree and credits would be transferable.” *Id.* at 20–21.

nor Salt Lake City Community College would accept her credits from Everest.⁷ The stories above highlight complaints found in various class actions.⁸ These students all alleged they were victims of fraud and misrepresentation perpetrated by the for-profit schools they trusted to help them achieve a better life.⁹

A hallmark of the American entrepreneurial spirit is the desire to seek out opportunities where a need exists in the market.¹⁰ Unfortunately, sometimes these ventures stray from their intended purpose of meeting a need and become tools by which businesses exploit the disadvantaged for profit.¹¹ Exploitation of the socioeconomically disadvantaged is nothing

7. *Id.* at 21–22. Ms. Miller left Everest with a debt of over \$30,000. *Id.* at 24. She alleges that Everest not only misrepresented the ability to transfer credits earned, but also misled her regarding program costs, causing her to take out additional loans. *Id.* at 2.

8. Class Action Complaint at 4–5, 9–10, *Bernal v. Burnett*, No. 1:10-cv-01917, 2010 WL 3940944 (D. Colo. filed Aug. 11, 2010); Class Action Complaint at 17–18, *Montgomery v. Corinthian Colls., Inc.*, No. 10-ch-50281, 2010 WL 4815908 (Cir. Ct. Ill. filed Nov. 23, 2010); Complaint at 2, 9, *Miller v. Corinthian Colls., Inc.*, No. 100918220, 2010 WL 4815908 (D. Utah filed Sept. 24, 2010).

9. Class Action Complaint at 4–5, 9–10, *Bernal v. Burnett*, No. 1:10-cv-01917, 2010 WL 3940944 (D. Colo. filed Aug. 11, 2010); Class Action Complaint at 17–18, *Montgomery v. Corinthian Colls., Inc.*, No. 10-ch-50281, 2010 WL 4815908 (Cir. Ct. Ill. filed Nov. 23, 2010); Complaint at 2, 9, *Miller v. Corinthian Colls., Inc.*, No. 100918220, 2010 WL 4815908 (D. Utah filed Sept. 24, 2010).

10. See Amir N. Licht, *The Entrepreneurial Spirit and What the Law Can Do About It*, 28 COMP. LAB. L. & POL'Y J. 817, 821 (2007) (discussing the importance of entrepreneurs in society, their psychological profile, and how governments can encourage entrepreneurial behavior). The entrepreneur is a unique individual who has the innate ability to identify changes in the marketplace based on changes in supply and demand. *Id.* Based on their unique skills, entrepreneurs can be catalysts of change, altering how society deals with changing needs and wants. *Id.* at 822. The founders of the large for-profit colleges meet this profile. See RICHARD S. RUCH, *HIGHER ED, INC.* 92 (2001) (asserting that for-profit schools are centrally focused on ensuring profits in order to satisfy stockholders and realize their business goals). They recognized a need for alternative education programs and capitalized on this need in underserved minority markets. RICHARD S. RUCH, *HIGHER ED, INC.* 72 (2001). For example, the University of Phoenix (UOP) attributes its success to founder John Sperling's desire to be a first mover and innovator. Bill Breen, *The Hard Life and Restless Mind of America's Education Billionaire*, *FAST CO.*, (Feb. 28, 2003), available at <http://www.fastcompany.com/magazine/68/sperling.html?page=0%2C2>. Sperling capitalized early on the growing trend of the adult student, online education, and, most recently, customized e-books. *Id.*

11. Cf. Craig Anthony (Tony) Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 WM. & MARY ENVTL. & POL'Y REV. 785, 809–10 (2009) (describing the local and global impact of water privatization). Water privatization is the private ownership and control of water sources for private gain and includes management of the sources as well as distribution. *Id.* at 790. While the policy of allowing private entities to control this vital resource has led to technological enhancements of infrastructure, it has also led to increased costs and exploitation of resources and the consumer. *Id.* at 796. The author provides a strong example of how pri-

new in the context of predatory lending, and recently, a new threat has emerged: exploiting Americans looking for a brighter future through education.

Over the past thirty years, for-profit institutions of higher education have offered individuals, neglected by traditional post-secondary schools, the promise of achieving the American Dream through education.¹² Since proprietary schools became eligible for Title IV funding under the Higher Education Act, they have used misrepresentation, fraud, and general predatory practices in order to increase enrollments and achieve profit.¹³ Although Congress has established roadblocks to impede the abuses, reports persist from students who have been victimized by these schools. This has led many to conclude that the driving force behind these schools is the profit motive—not providing a worthwhile education.¹⁴

For-profit schools educate only ten percent of the students enrolled in institutions of higher education, but these schools receive over twenty-

vate industry is exploiting a natural resource for profit to the detriment of the environment and is analogous to the for-profit education sector. *Id.* at 786. While water privatization exploits a natural resource needed for survival, for-profit colleges exploit the desires of the underemployed for a better life.

12. Michael J. Seiden, Commentary, *For-Profit Colleges Deserve Some Respect*, CHRON. OF HIGHER EDUC., June 29, 2009, <http://chronicle.com/article/article-content/46985/> (reflecting on his years as a Dean at a for-profit college and remarking on the new opportunities these schools provide to students who are unable to attend traditional colleges and universities).

13. See Education Amendments of 1972, Pub. L. No. 92-318, sec. 417B(c), § 461, 86 Stat. 235, 259–60 (codified as amended in scattered sections of 20 U.S.C.) (authorizing federal financial aid to for-profit institutions offering educational programs to prepare students for gainful employment); NAT'L CONSUMER LAW CTR., MAKING THE NUMBERS COUNT: WHY PROPRIETARY SCHOOL PERFORMANCE DATA DOESN'T ADD UP AND WHAT CAN BE DONE ABOUT IT 10 (2005), available at <http://www.studentloanborrowerassistance.org/blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/ProprietarySchoolsReport.pdf> (cataloging the troubled history of for-profit schools); JOHN B. LEE & JAMIE P. MERISOTIS, ASHE-ERIC HIGHER EDUC. REPORTS, PROPRIETARY SCHOOLS: PROGRAMS, POLICIES AND PROSPECTS 1 (1990) (writing prior to the Higher Education Amendments and mentioning high default and growth rates of proprietary schools).

14. Higher Education Amendments of 1992, Pub. L. No. 102-325, §§ 481, 490(a), 106 Stat. 448, at 609–11, 625–27 (1992) (codified as amended in scattered sections of 20 U.S.C.) (strengthening the eligibility requirement for proprietary schools under the Higher Education Amendments). The enhancements made by the 1992 Higher Education Amendments took steps to increase the accountability of for-profit schools by requiring that at least fifteen percent of a school's revenue come from sources outside Title IV funds and that no more than fifty percent of classes be offered through distance education. *Id.* at 610–11. The amendments also defined the amount of credit hours or clock hours required for eligible programs and added additional requirements to the program participation agreements (PPAs), including the incentive compensation ban discussed in Part IV of this Comment. *Id.* at 611, 625–27.

three percent of Title IV federal loans and grants.¹⁵ The percentage of government payouts has doubled over the past ten years, keeping pace with increased student enrollments.¹⁶ Significantly, over ninety-five percent of for-profit students receive some type of federal student aid.¹⁷ Students attending these schools graduate with more debt than traditional students, and are more likely to default on their loans.¹⁸ For-profit schools target minorities traditionally underrepresented at institutions of higher education.¹⁹ They do so by placing schools in locations convenient to students' homes or workplaces, and convenient to public transportation while developing advertising messages to appeal to these students' desires to improve their lives.²⁰

Research and hearings conducted by the Senate Health, Education, Labor and Pensions Committee addressed the emerging risk of student debt and the predatory role of for-profit colleges.²¹ These endeavors exposed the reality that the primary goal of for-profit colleges is to make money.²² The focus on the bottom line has led to rampant fraud and misrepresentation in the for-profit college admissions processes and the exploitation of low-income and minority students.²³ Because the primary goal of a for-profit college is generating revenue, a catch-22 has developed.

15. TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 4 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>.

16. *Id.* at 3. The growth of for-profit schools has been exponential with the number of students increasing from less than 600,000 in 1998 to 1.8 million in 2008. *Id.* at 2.

17. NAT'L CTR. FOR EDUC. STATISTICS, PROFILE OF UNDERGRADUATE STUDENTS: 2007-08, 109 (2010), available at <http://nces.ed.gov/pubs2010/2010205.pdf>.

18. TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 8-9 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>.

19. See Transcript of *Frontline: College Inc.* (WGBH Educational Foundation television broadcast May 4, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/etc/script.html>.

20. See *id.*

21. TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 9 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>.

22. *Id.* at 1.

23. See *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 2 (2010) (testimony of Lauren Asher, President, Institute for College Access & Suc-

To achieve a strong balance sheet, for-profit schools must continually increase enrollments, and targeting poor individuals who are eligible for federal financial aid is the quickest and easiest way to accomplish this goal.²⁴ By focusing on the bottom line, a necessity in any successful for-profit business, these schools emphasize the number of enrollments, and often fail to provide a quality education.²⁵ Schools are in a no-win situation: spending money to provide improved education will reduce profits, and their profit motives lead schools to neglect the educational needs of students. This Comment seeks to explain the catch-22 experienced by for-profit colleges, address reports of fraud and misrepresentation, and analyze the new Department of Education (DOE) regulations designed to increase the transparency and accountability of for-profit institutions.²⁶

Part II of this Comment focuses on the business of for-profit education. A short definition of for-profit colleges is explored in conjunction with an analysis of the growth of the new corporate proprietary colleges. While this Comment does not deny that for-profit education has a place in the United States, it does call into question the methods used to attain healthy shareholder value. Part III addresses the issues of fraud and material misrepresentation. Using the new DOE regulations as a roadmap, three areas are considered: (1) misrepresentation in marketing; (2) fraud in connection with the value of the degree; and (3) fraud relating to financial matters. Each area is discussed with attention given to controlling law, reported violations, analysis of the new DOE Program Integrity rules, and finally, recommendations for additional actions that may be necessary to ensure students are protected from future predatory practices.

Part IV discusses the October 2010 DOE Program Integrity regulations which strengthen the ban on incentive compensation for admissions representatives at for-profit colleges. This section addresses specific examples of violations as well as legal developments in enforcement of the

cess), available at <http://help.senate.gov/imo/media/doc/Asher.pdf> (examining the negative impact of for-profit colleges on students).

24. See generally Joshua Woods, *Opportunity, Ease, Encouragement, and Shame: A Short Course in Pitching For-Profit Education*, CHRON. OF HIGHER EDUC., THE CHRON. REV., Jan. 13, 2006, at 10 (using himself as an experiment, the author disguised as a prospective student to for-profit colleges and Michigan State University).

25. See RICHARD S. RUCH, HIGHER ED, INC. 6 (2001) (arguing that some for-profit universities do laudable work providing an education). It is important to note that non-profit schools and for-profit schools are *both* capable of fraud and misuse of funds. *Id.* at 3.

26. See Press Release, U.S. Dep't of Educ., Obama Administration Proposes Student Aid Rules to Protect Borrowers and Taxpayers; Key Elements of Gainful Employment on a Separate Track (June 16, 2010), available at <http://www.ed.gov/news/student-aid-rules-protect-borrowers-and-taxpayers> (acknowledging that for-profit colleges are not always preparing students for jobs).

bans. Part V briefly considers the financial implications of the for-profit business model, specifically the impact of the elevated student debt shouldered by students of the for-profits.²⁷ Part VI concludes by giving an overall analysis of the DOE regulations and providing additional solutions for eliminating the abuses of for-profit colleges. It must be noted that the scope of the new regulations promulgated by the DOE is quite broad; the analysis below focuses only on a few select areas and is not intended to be a comprehensive review of the regulations.

II. FOR-PROFIT POST-SECONDARY EDUCATION: ORIGINS AND PRACTICE

A. *For-Profit Defined*

“For-profit college,” “proprietary institution,” “trade school,” and “private career school” describe institutions of post-secondary higher education providing job-focused education and skills while deriving a profit.²⁸ Each designation is slightly different, but all are non-traditional avenues for students to meet educational goals after graduating high school or obtaining a GED.²⁹

References to proprietary schools originate in the 18th century.³⁰ These small institutions provide training in fields such as cosmetology, auto mechanics, and other trades in controlled industries.³¹ Although these schools are not immune to the abuses addressed above and are bound by the same federal regulations as for-profit colleges, the greatest

27. See *Subprime Goes to College: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 1–2 (2010) (testimony of Steven Eisman, Portfolio Manager, FrontPoint Financial Services Fund), available at <http://help.senate.gov/imo/media/doc/Eisman.pdf> (showing that over twenty-one billion dollars have entered the for-profit education industry from federal loans).

28. RICHARD S. RUCH, *HIGHER ED, INC.* 2–3 (2001); see also JOHN B. LEE & JAMIE P. MERISOTIS, ASHE-ERIC HIGHER EDUC. REPORTS, *PROPRIETARY SCHOOLS: PROGRAMS, POLICIES AND PROSPECTS* 15–17, 25–29 (1990).

29. See JOHN B. LEE & JAMIE P. MERISOTIS, ASHE-ERIC HIGHER EDUC. REPORTS, *PROPRIETARY SCHOOLS: PROGRAMS, POLICIES AND PROSPECTS* 25–29 (1990) (finding that minorities preferred for-profit career schools over public institutions).

30. *Id.* at 4 (discussing the historical context and development of proprietary schools).

31. RICHARD S. RUCH, *HIGHER ED, INC.* 3 (2001). Actual vocational schools, as they are understood today, are a vestige of the Industrial Revolution designed purely to meet the growing need for skilled individuals. See JOHN B. LEE & JAMIE P. MERISOTIS, ASHE-ERIC HIGHER EDUC. REPORTS, *PROPRIETARY SCHOOLS: PROGRAMS, POLICIES AND PROSPECTS* 4 (1990). Modeled after the Lyceum Movement, originating in France, these institutions provided private schooling focused on practical instruction in a specialized trade such as mechanics or carpentry. *Id.* at 4–5.

concern surrounding fraudulent behavior and abuses is attached to the growing breed of corporate for-profit colleges.³²

The term “corporate for-profit college” represents the development of large university systems operated by corporations, both publicly traded and closely held.³³ The goal of these institutions is to make a profit, and in the case of the publicly traded corporation, there is additional pressure to increase shareholder value and maintain a high stock price.³⁴ In order to meet these goals, the schools pay strict attention to increasing enrollment and collecting tuition.³⁵ More specifically, because of the socioeconomic status of the students, these schools focus on collecting Title IV federal loans in any way possible.³⁶ This has led to schools using fraudulent misrepresentations and reports of schools deriving up to 88.9% of revenues from Title IV programs.³⁷

There are currently fourteen publicly traded for-profit educational institutions.³⁸ The for-profit schools most readily thought of—ITT, DeVry,

32. See TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., *EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 1* (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf> (highlighting the fact that for-profit institutions seek to maximize their profits first and foremost).

33. See RICHARD S. RUCH, *HIGHER ED, INC.* 3 (2001).

34. See *id.* at 95; Michael J. Seiden, Commentary, *For-Profit Colleges Deserve Some Respect*, CHRON. OF HIGHER EDUC., June 29, 2009, at 80 (stating the reflection of a twenty-five year veteran of for-profit colleges and his response to criticism of the industry).

35. See *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 2 (2010) (written statement of Joshua Pruyn, former Admissions Rep., Alta College, Inc.), available at <http://help.senate.gov/imo/media/doc/Pruyn.pdf> (explaining how a job as an admissions representative for a for-profit university was nothing more than a sales job designed to enroll as many students as possible in the school).

36. *Subprime Goes to College: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 2 (2010) (testimony of Steven Eisman, Portfolio Manager, FrontPoint Financial Services Fund), available at <http://help.senate.gov/imo/media/doc/Eisman.pdf> (articulating that for-profit schools will go to great lengths to achieve profit through federal student loan programs); see RICHARD S. RUCH, *HIGHER ED, INC.* 97–99 (2001) (explaining for-profit schools’ revenue sources).

37. See TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., *EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 4* (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>. The actual revenue percentage reported to the DOE is 81.3%, reflecting the ability of schools to exclude increased distributions of Stafford Loans from revenue calculations. *Id.* Congress’ initial requirement that a school must have at least fifteen percent of its revenue from sources other than Title IV funds was reduced to ten percent in 1998, creating what is called the 90/10 rule. *Id.* at 4, n.12.

38. *Id.* at 2.

Sanford Brown, Kaplan University, and the University of Phoenix—are all part of, or the parent of, publically traded corporations.³⁹ For example, Sanford-Brown is a business unit of Career Education Corporation,⁴⁰ and Kaplan Higher Education (under the brand names of Kaplan University and Kaplan Higher Education) is owned by The Washington Post Company.⁴¹

The University of Phoenix (UOP), often held out as the model of adult centered education, is owned and operated by the Apollo Group, Inc.⁴² For the fiscal year ending in 2009, Apollo Group reported net revenues of four-billion dollars, ninety-five percent of which came from the operating profits of the UOP.⁴³ The UOP began enrolling students in 1979, representing a whole new type of university: one that banned lectures and uti-

39. See *Competitors for Corinthian Colleges, Inc.*, iSTOCKANALYST.COM, <http://www.istockanalyst.com/competitor/COCO> (last visited Mar. 5, 2010). Under each corporate structure, there can be numerous colleges and career training programs. For example, Corinthian Colleges, Inc. has three brands: Wyotech, Heald College, and Everest. *Our Brands*, CORINTHIAN COLLS. INC., <http://www.cci.edu/brands> (last visited Mar. 5, 2010). In turn, Everest College has six additional brands, such as Everest College, Everest Institute, and Everest University Online. *Id.* Corinthian Colleges operates over one hundred campuses in North America, enrolling in excess of 105,000 students, and offering degrees ranging from accounting to massage therapy. *Company History*, CORINTHIAN COLLS. INC., <http://www.cci.edu/about/history> (last visited Mar. 5, 2010). This is just one illustration of the intricate web created by for-profit schools creating confusion amongst prospective students.

40. *About CEC*, CAREER EDUC. CORP., http://www.careered.com/about_industry.aspx (last visited Mar. 5, 2010). CEC was founded in 1994 and manages brands such as Le Cordon Bleu North America and American Intercontinental University. *Id.*

41. *History*, WASH. POST CO., <http://www.washpostco.com/phoenix.zhtml?c=62487&p=irol-history1975> (last visited Mar. 5, 2011). In 2009, Kaplan reported over \$2.6 billion in revenue and managed more than seventy higher education campuses worldwide, a far cry from its humble beginning in 1938 as a test preparation company. *Building Futures One Success Story at a Time*, KAPLAN 3 (2010), available at http://www.kaplan.com/about_kaplan/companyoverview/Documents/Kaplan%20Corporate%20Brochure%202010%20-%20FINAL.pdf.

42. RICHARD S. RUCH, HIGHER ED, INC. 28 (2001). The University of Phoenix was founded in 1976 and became publically traded in 1994. *Id.*; see also JOHN SPERLING & ROBERT W. TUCKER, FOR-PROFIT HIGHER EDUCATION, at ix (1997) (considering UOP as the “exemplar” model of an adult-centered university).

43. 2009 *Annual Report*, APOLLO GRP., INC. 64, 66 (2009), available at <http://www.apollogrp.edu/Annual-Reports/2009%20Apollo%20annual%20report.pdf>. The UOP is the brainchild of John Sperling. Sperling, a man who graduated high school barely able to read, obtained a PhD from Cambridge University before becoming a tenured professor at San Jose State. Bill Breen, *The Hard Life and Restless Mind of America's Education Billionaire*, FAST CO. (Feb. 28, 2003), available at <http://www.fastcompany.com/magazine/68/sperling.html?page=0%2C2>.

lized a standardized peer-based learning curriculum.⁴⁴ Critic Bill Breen asserts that UOP founder John Sperling's goal is not to provide a quality learning experience, but to be the world's largest for-profit university.⁴⁵ UOP achieved this through rapid growth and expansion.⁴⁶ Advice given to Sperling is still followed in the industry: "find a school in financial trouble and convince the people running it that your program will generate a profit."⁴⁷ Because regional accreditation is a necessary eligibility requirement for receipt of government financial aid funds, investors may purchase an existing school that has accreditation, creating a new for-profit institution, without taking additional steps to meet the requirements of the Higher Education Act.⁴⁸

In order for for-profit schools to make a profit, they need to continually grow the student body.⁴⁹ Unlike non-profits that have enrollment caps, for-profit schools have endless capacity and the low completion rate requires a high level of enrollments to balance the lost revenues.⁵⁰ In reviewing the demographic make-up of these schools, it is hard not to question whether the statistics are the result of market need, stellar marketing campaigns, or underhanded practices.⁵¹

44. Bill Breen, *The Hard Life and Restless Mind of America's Education Billionaire*, FAST Co. (Feb. 28, 2003), available at <http://www.fastcompany.com/magazine/68/sperling.html?page=0%2C2>.

45. *Id.*

46. *See id.* (describing the "immediate financial success" of Sperling's initial program at University of San Francisco before starting UOP).

47. *Id.*

48. TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 2 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>; *see* Higher Education Act, 20 U.S.C. § 1094(a)(14)(B)–(C) (2006) (laying out steps that allow a purchaser of a for-profit school to avoid acquiring new accreditation); *see also* Transcript of *Frontline: College Inc.* (WGBH Educational Foundation television broadcast May 4, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/etc/script.html>.

49. *See* RICHARD RUCH, HIGHER ED, INC. 95–97 (2001) (indicating that "[i]n the for-profits, the admissions offices are basically sales organizations, and the admissions staff is made up of salespeople.").

50. *See* Edited Transcript of *Frontline: College, Inc.* (Feb. 17, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/interviews/mellow.html> (interview with Dr. Gail Mellow, President, LaGuardia Community College); *see also* *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 13 (2010) (testimony of Lauren Asher, President, Institute for College Access & Success), available at <http://help.senate.gov/imo/media/doc/Asher.pdf>.

51. *See* RICHARD S. RUCH, HIGHER ED, INC. 72–73, 95–97 (2001) (analyzing how for-profit colleges meet the market need for providing education to otherwise underserved minorities). While Ruch speaks positively of the for-profits' ability to meet the needs of minority students, he also notes that this occurs not due to social good but from economic

B. *Demographics*

The Department of Education (DOE) released a report entitled, *Profile of Undergraduate Students: 2007–08* in September of 2010.⁵² This report catalogs the attributes of students across various institutions of post-secondary education.⁵³ While many students who attend for-profit schools seek knowledge and come to class willing and able to contribute, many students are unprepared to handle the academic challenge.⁵⁴ This leads to the question: is the drive for volume causing for-profits to enroll students destined to fail?⁵⁵

opportunity. *Id.* at 72. Ruch also acknowledges that the emphasis placed on profit often leads to high-pressure sales tactics. *Id.* at 96.

52. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, PROFILE OF UNDERGRADUATE STUDENTS: 2007–08, 1 (2010), *available at* <http://nces.ed.gov/pubs2010/2010205.pdf>.

53. *Id.*

54. *Compare* JOHN SPERLING & ROBERT W. TUCKER, FOR-PROFIT HIGHER EDUCATION 90 (1997) (describing the profile of the average UOP student as an individual with meaningful work experience seeking a “better place in tomorrow’s work environment.”), *with* TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 7–8 (Comm. Print 2010), *available at* <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf> (attempting to decipher the dropout rates at for-profit colleges which may be upwards of sixty percent).

55. The lack of standards in pre-admissions testing at for-profit colleges is an issue addressed by the DOE’s new regulations. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,960–66 (Oct. 29, 2010) (to be codified at 34 C.F.R. pt. 668). However, this facet of the regulations is beyond the scope of this Comment.

SELECTED DEMOGRAPHIC INFORMATION ARRANGED BY
PROGRAM TYPE⁵⁶

	For-Profit <2yrs.	For-Profit +2yrs.	Public <2yrs.	Public 2 yrs.	Non-Profit 4 yrs.
Female ⁵⁷	76.2%	67.1%	62.8%	56.3%	54.2%
Minority (non-white) ⁵⁸	61.2%	51.1%	43.9%	39.8%	33.1%
Average Age ⁵⁹	26	29	30	28	24
Family Income <\$20,000 ⁶⁰	52.8%	42%	36%	26.4%	19.6%
Students with Dependents ⁶¹	45.1%	50.7%	43.5%	32.2%	14.4%
Students with Nontraditional High School Diplomas ⁶²	20.1%	16.1%	19.2%	10.4%	3.1%
Receiving Federal Aid ⁶³	83.4%	95.8%	38.5%	27.4%	54.6%

The demographics above are compared across several program types and illustrate the unbalanced distribution of minorities and underprivileged students attending for-profit and non-profit institutions as well as two-year, four-year, and certificate programs (less than two years).⁶⁴ The table above provides a comparison of student demographics, and high-

56. See generally U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, PROFILE OF UNDERGRADUATE STUDENTS: 2007-08 (2010), available at <http://nces.ed.gov/pubs2010/2010205.pdf> (reporting statistics on undergraduate students from 2007 through 2008, on topics such as financial aid status, race, age, and attendance). The chart was created by the author from information derived from the DOE's *Profile of Undergraduate Students: 2007-08*. See *id.* at 56, 58, 60, 64, 77, 81, 89, 93, 109.

57. *Id.* at 56.

58. See *id.* at 60. The percentage of White students was subtracted from 100% in order to determine percentage of non-white students.

59. *Id.* at 64.

60. See *id.* at 72, 77, 81. To calculate income, the percentage of students with incomes under \$20,000 was added together from both independent and dependent students. Table 3.5A uses weighted percentages based upon dependency status of individuals enrolled at various institutions.

61. See U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, PROFILE OF UNDERGRADUATE STUDENTS, 2007-08, 89 (2010), available at <http://nces.ed.gov/pubs2010/2010205.pdf> (reporting on the percentage of undergraduates, both married and single, who are responsible for dependents). The number of students with dependents was calculated by subtracting the percentage of students with no dependents from 100%.

62. *Id.* at 93. Calculation of all nontraditional diplomas is calculated by subtracting the students with high school diplomas from 100%.

63. *Id.* at 109. Federal aid includes Stafford Loans, Perkins Loans, and Pell Grants.

64. *Id.* at 160-61, 163. Non-profit four-year degree programs include both private and public schools that confer bachelor's degrees and are classified as 501(c)(3) organizations. *Id.* at 160. Public two-year degree programs consist of associate degrees conferred by community colleges. See *id.* at 163. Both for-profit categories represent institutions that are operated for profit: a less-than two-year degree includes career training and certificate

lights the disparity between for-profit schools and non-profit schools, including the fact that for-profits, on average, educate almost twice as many minorities.⁶⁵ Yet the most striking figure in the chart is income level: over half of students in career training programs live near the poverty level, which is almost twenty percent higher than students enrolled in public career programs (community colleges).⁶⁶

The majority of low-income students attend less-than two-year degree programs: these programs provide hands-on training in fields such as radiology, nursing, web design, and electrical repair.⁶⁷ Many schools offer these degrees in eighteen months, advertise placement assistance, and guarantee students that degree completion will earn them a higher salary.⁶⁸ The profit model of for-profit schools is successful because of the marketing efforts geared toward attracting low-income individuals, which guarantees federal financial aid dollars.⁶⁹ For-profit institutions offer an educational route for those individuals who do not feel comfortable in a

programs while two plus years includes programs for completing both bachelor's and associate's degrees. *Id.*

65. *Id.* at 60. The increased representation of minorities at for-profits is a positive step in increasing opportunities for the underrepresented, but this method of education is not exactly what scholars imagined when contemplating increases in minority students in higher education. See Pratheep Sevanthinathan, *Shifting from Race to Ethnicity in Higher Education*, 9 SCHOLAR 1, 4–6 (2006) (addressing the role of affirmative action in achieving diversity in traditional institutions of higher education). Mr. Sevanthinathan argues that the concept of racial diversity in higher education needs to be expanded to include all minorities. *Id.* It flows from this argument that socioeconomic minorities should also be considered when addressing diversity issues in higher education. Whereas minorities are underrepresented in traditional institutions of higher education, for-profit colleges represent the other end of the spectrum, in which minorities are disproportionately represented.

66. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, PROFILE OF UNDERGRADUATE STUDENTS: 2007–08, 77, 81 (2010), available at <http://nces.ed.gov/pubs2010/2010205.pdf>; Annual Update of HHS Poverty Guidelines, 74 Fed. Reg. 4199, 4120 (Jan. 23, 2009) (providing that the 2009 national poverty guideline is \$10,830 for an individual, \$14,570 for a family of two, \$18,310 for a family of three and \$22,050 for a family of four).

67. See U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, PROFILE OF UNDERGRADUATE STUDENTS: 2007–08, 77, 81 (2010), available at <http://nces.ed.gov/pubs2010/2010205.pdf>.

68. See e.g., *Your Decision to Enroll at Remington College Just Got Easier*, REMINGTON COLL. (Dec. 17, 2010), <http://www.remingtoncollege.edu/fast-affordable-associates-degrees>; see also Complaint at 4–5, *Bernal v. Burnett*, No. 10-cv-01917-PAB, (D. Colo. Aug. 11, 2010), 2010 WL 3940944 (illustrating how one for-profit institution urges its “admissions representatives to provide uniform misrepresentations and make material omissions as to the costs and fees related to Westwood programs; job placement opportunities and salary expectations.”).

69. See TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING

traditional academic setting, and although students point to online learning and flexible classes as a reason for attendance, these attributes are now available in increasing numbers from traditional, non-profit schools.⁷⁰

For-profits have honed in on high demand educational areas and capitalized on the shortfalls of community colleges. Generally, for-profits excel over community colleges in three areas: (1) for-profits have higher levels of staffing, allowing greater resources for financial aid and career planning; (2) for-profits have more flexibility and ability to change programs as needed; and (3) for-profits use effective marketing strategies.⁷¹ In addition to the fact that prospective students are often unaware of less expensive public programs, a new issue has recently emerged: a lack of capacity at community colleges.

Community colleges are turning students away due to lack of capacity resulting from state budget deficits and misappropriation of federal stimulus funds.⁷² Community colleges in New York and California are placing students on waitlists for highly sought programs such as nursing, and budget cuts deprive these schools of resources necessary to employ financial aid officers.⁷³ These factors drive students to the conveniently located and highly visible for-profit schools, whose advertisements offer “easy” ways to improve lives. Unfortunately, many of the advertisements are overstatements and provide students with misleading information.

BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 1–2 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>.

70. Michelle Howard-Vital, *The Appeal Of For-Profit Institutions*, CHANGE: THE MAG. OF HIGHER LEARNING, Jan./Feb. 2006, at 70.

71. Edited Transcript of *Frontline: College, Inc.* (Feb. 17, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/interviews/mellow.html> (interview with Dr. Gail Mellow, President, LaGuardia Community College). In evaluating the facilities of a for-profit college, it must be noted that a great deal of space and money is devoted to the admissions and financial aid offices, while faculty offices may be nonexistent. Michelle Howard-Vital, *The Appeal Of For-Profit Institutions*, 38 CHANGE: THE MAG. OF HIGHER LEARNING 68, 70 (Jan./Feb. 2006). This physical set up of for-profits provides insight into the importance of recruiting and financial aid. *Id.*

72. See STEPHEN G. KATSINAS & TERRENCE A. TOLLEFSON, EDUC. POLICY CTR. AT THE UNIV. OF ALA., FUNDING AND ACCESS ISSUES IN PUBLIC HIGHER EDUCATION: A COMMUNITY COLLEGE PERSPECTIVE 14–17 (2009), available at <http://education.ua.edu/wp-content/uploads/2010/01/Funding-and-Access-Issues-in-Public-Higher-Education-2009-24-09.pdf>.

73. Edited Transcript of *Frontline: College, Inc.* (Feb. 17, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/interviews/mellow.html> (interview with Dr. Gail Mellow, President, LaGuardia Community College).

III. MATERIAL MISREPRESENTATION

Congress and the Department of Education (DOE) seek to provide a post-secondary education to more individuals and develop a competitive workforce.⁷⁴ Although for-profit schools hold an important place in the educational landscape, the recurring reports of fraud and misrepresentation in the industry detract from the sector.⁷⁵ In response to prior reports of fraud in for-profit schools, Congress passed the Higher Education Amendments of 1986, 1992, and 1998.⁷⁶

During the spring of 2010, the media alerted the general public to the abuses of for-profit colleges by exposing the practices (used by some for-profit colleges) of soliciting enrollment at homeless shelters. The story was built upon by a documentary entitled *College, Inc.*, which chronicled the business of for-profit post-secondary education and exposed the predatory practices, escalating costs, and skyrocketing loan default rates.⁷⁷

74. Press Release, U.S. Dep't of Educ., Obama Administration Proposes Student Aid Rules to Protect Borrowers and Taxpayers; Key Elements of Gainful Employment on a Separate Track (June 16, 2010), <http://www.ed.gov/news/student-aid-rules-protect-borrowers-and-taxpayers>.

75. *Id.* (revealing alleged misrepresentation by for-profit schools and proposing stronger administrative oversight).

76. See Higher Education Amendments of 1998, Pub. L. 105-244, 112 Stat. 1581, 1588-89 (1998) (codified as amended at 20 U.S.C. § 1002(a)(4-6) (2006)) (explaining eligibility requirements to be an institution of higher learning and potential reasons for loss of this status); Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448, 459 (1992) (attempting to improve education services to disadvantaged students); Higher Education Amendments of 1986, Pub. L. 99-498, 100 Stat. 1268, 1490 (1986) (threatening civil penalties against education institutions that engage in misrepresentation). These regulations gave the DOE the ability to enforce PPAs between the DOE and eligible institutions as well as increased the eligibility requirements for proprietary institutions of higher education.

77. Daniel Golden, *Homeless High School Dropouts Lured by For-Profit Colleges*, BLOOMBERG.COM (April 29, 2010, 11:01 PM), <http://www.bloomberg.com/news/2010-04-30/homeless-dropouts-from-high-school-lured-by-for-profit-colleges-with-cash.html> (detailing the temptation of for-profit schools to enlist homeless persons as part of their enrollment campaigns); Transcript of *Frontline: College Inc.* (WGBH Educational Foundation television broadcast May 4, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/etc/script.html> (exposing the players behind the for-profit higher education industry); Steve Eisman, Presentation at the Ira Sohn Conference: Subprime Goes to College 2 (May 26, 2010), <http://insidehighered.com/content/download/350088/4329742/version/1/file/EismanSohnConference.doc> (analyzing the high debt load and default rates of students attending for-profit colleges). In June of 2010, twenty executives from homeless shelters wrote a letter to DOE Secretary Arne Duncan addressing marketing abuses by for-profit colleges and encouraging the DOE's regulation initiative. Sharona Coutts, *Investment Funds Stir Controversy Over Recruiting by For-Profit Colleges*, PROPUBLICA.COM (Jul. 9, 2010, 11:02 AM), <http://www.propublica.org/article/investment-funds-stir-controversy-over-recruiting-by-for-profit-colleges> (revealing the financial interests at stake in the for-profit education industry). After an investigation by the news organization ProPublica,

The timing of these stories stirred speculation that the news attention was either placed to develop favorable public opinion of the forthcoming regulations, or was itself the impetus for the regulations.

An April 28, 2010 speech by a DOE official, critical of for-profit colleges, made it clear that the Obama administration was preparing to once again take steps to address an insurgence of fraud accusations, rising student debt, and disproportionate default rates of for-profit students.⁷⁸ The Notice of Proposed Rulemaking, announced on June 16, 2010, identified thirteen areas of concern in the for-profit higher education industry.⁷⁹ A separate notice filed on July 23, 2010 focused on a fourteenth issue: defining gainful employment.⁸⁰ The proposed regulations represent a year-long dialog between the DOE and teams of negotiators representing stakeholders.⁸¹

Shortly following the dissemination of the proposed rules, the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP) began conducting hearings to learn more about the emerging risk posed by for-profit education.⁸² The first hearing featured a Senate report high-

it was determined that the letter was orchestrated by an individual working for an investment firm. *Id.* While there is little doubt that for-profit colleges have marketed their products through homeless shelters and other inappropriate channels, this development highlights the concern some have about the influence of investment professionals in the for-profit controversy. *Id.* Some Congressional leaders question the motives of these individuals due to short sell positions in the for-profit education sector held by investment firms vocal in the debate. *Id.* These firms will benefit financially from declines in stock prices caused by bad press and increased regulations. *Id.*

78. John Hechinger et al., *Obama Plans New Rules Cutting Aid to For-Profit Colleges*, BLOOMBERG.COM (May 4, 2010, 11:02 PM), <http://www.bloomberg.com/news/2010-05-04/obama-eyes-rules-on-apollo-career-education-aid-as-companies-plan-fight.html> (recounting frustration at the high debt levels of students enrolled for-profit institutions). The proposed rules would require for-profit schools to demonstrate that their graduates earn sufficient incomes to pay off their loans. *Id.*

79. Press Release, U.S. Dep't of Educ., *Obama Administration Proposes Student Aid Rules to Protect Borrowers and Taxpayers; Key Elements of Gainful Employment on a Separate Track* (June 16, 2010), <http://www.ed.gov/news/student-aid-rules-protect-borrowers-and-taxpayers>.

80. Press Release, U.S. Dep't of Educ., *Proposed Rule Links Federal Student Aid to Loan Repayment Rates and Debt-to-Earnings Levels for Career College Graduates* (July 23, 2010), <http://www.ed.gov/news/press-releases/proposed-rule-links-federal-student-aid-loan-repayment-rates-and-debt-earnings>. To remain "fully eligible" under the administration's planned revisions, for-profit schools must maintain certain prescribed ratios of students and graduates who can pay down student debt. *Id.*

81. Press Release, U.S. Dep't of Educ., *Obama Administration Proposes Student Aid Rules to Protect Borrowers and Taxpayers; Key Elements of Gainful Employment on a Separate Track* (June 16, 2010), <http://www.ed.gov/news/student-aid-rules-protect-borrowers-and-taxpayers>.

82. Between June 24, 2010 and March 10, 2011 the HELP committee conducted four hearings on the issue of for-profit colleges. *Hearings*, U.S. COMM. ON HEALTH EDUCA-

lighting the disparity in cost, loan amounts, and default rates between for-profit and non-profit schools.⁸³ The second hearing highlighted a Government Accountability Office (GAO) undercover report exposing fraudulent practices of fifteen for-profit colleges.⁸⁴ These hearings showcased personal stories of students, former and current employees, and professionals engaged in investigation and prosecution of for-profit colleges. The fraud uncovered through these hearings can be roughly broken into four categories, each addressed by the DOE's new Program Integrity rules: (1) fraud in marketing practices; (2) fraudulent misrepresentation in the value of the degree; (3) fraud in financial aid practices; and (4) violations of bans on enrollment based compensation for admissions representatives.⁸⁵

A. Marketing

"[A]dvertising makes people who can't afford it, buy things they don't want, with money they haven't got."⁸⁶

Marketing and advertising are an integral part of any business, regardless of the industry or profit motive. Even top tier institutions of higher education entice prospective students with glossy brochures and professionally produced videos. No demand can be made on proprietary col-

TION LABOR & PENSIONS (Apr. 7, 2011), <http://help.senate.gov/hearings/?rid=20c1298a-5186-4859-8488-a6731cf07a9e>.

83. TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 8-9 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>.

84. *Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 2, 11-13 (Aug. 4, 2010 revised Nov. 30, 2010) (statement of Gregory D. Kuntz, Managing Director Forensic Audits and Special Investigations, U.S. Gov't Accountability Office), available at <http://www.gao.gov/new.items/d10948t.pdf>. The GAO report was revised on November 30th, 2010 to correct discrepancies in the wording between actual tapes and the written report. Tamar Lewin, *U.S. Revises Report on Commercial Colleges*, N.Y. TIMES, Dec. 9, 2010, at A35, available at 2010 WLNR 24364580 (reporting that subsequent revisions to the GAO report weakened but did not materially alter the findings of the sting operation). This revision heightened the already partisan environment surrounding the issue of for-profit colleges and the DOE's new regulations. *Id.*

85. See Press Release, U.S. Dep't of Educ., Obama Administration Proposes Student Aid Rules to Protect Borrowers and Taxpayers; Key Elements of Gainful Employment on a Separate Track (June 16, 2010), <http://www.ed.gov/news/student-aid-rules-protect-borrowers-and-taxpayers>.

86. MR. BLANDINGS BUILDS HIS DREAM HOUSE (RKO Radio Pictures 1948), available at <http://www.imdb.com/title/tt0040613/quotes>.

leges to cease advertising, but, as with the marketing of any product, appropriate guidelines are needed to ensure consumer protection.

The aggressive marketing tactics employed by for-profit schools are similar regardless of the institution or degree advertised. Advertisements take an emotional tone; they appeal to an individual's hopes and dreams of a better life.⁸⁷ Campaigns are designed to address a potential student's identified requirements of "need, speed and ease."⁸⁸

On average, for-profits spend over thirty percent of their annual budgets on marketing and recruiting.⁸⁹ In 2009, DeVry spent over \$179 million on advertising expenses, which is approximately \$3,800 per new student.⁹⁰ Every dollar is carefully targeted to reach the desired demographic.⁹¹ Pictures of men in business suits and women in lab coats boasting of their successes are plastered on bus shelters, aired during daytime television, and posted on job boards at unemployment offices.⁹² Advertisements are meticulously worded to achieve the maximum impact, elic-

87. See Michelle Howard-Vital, *The Appeal Of For-Profit Institutions*, 38 CHANGE: THE MAG. OF HIGHER LEARNING 68, 70 (2006) (describing the positive perception of for-profit schools held by some students); Joshua Woods, *Opportunity, Ease, Encouragement, and Shame: A Short Course in Pitching For-Profit Education*, 52 CHRON. REV. OF HIGHER EDUC. 10, 10 (2006) (recounting a personal experiment to ascertain the marketing rigor of for-profit schools).

88. Michelle Howard-Vital, *The Appeal Of For-Profit Institutions*, 38 CHANGE: THE MAG. OF HIGHER LEARNING 68, 70 (2006).

89. TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 5 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>.

90. DEVRY, INC., 2010 ANNUAL REPORT 81 (2010), available at http://www.devryinc.com/resources/pdfs/Annual_Report.pdf (stating DeVry's advertising expenses for the fiscal years 2008, 2009, and 2010). The cost per student was calculated by dividing the total advertising expense by the total number of new enrollments in 2009 (46,694 students). DEVRY, INC., 2010 ANNUAL REPORT 81 (2010), available at http://www.devryinc.com/resources/pdfs/Annual_Report.pdf; see also DEVRY, INC., 2009 ANNUAL REPORT 7 (2009), available at <http://www.annualreports.com/HostedData/AnnualReports/PDFArchive/dv2009.pdf> (providing an overview of the enrollment data for 2009).

91. See Michelle Howard-Vital, *The Appeal Of For-Profit Institutions*, CHANGE: THE MAG. OF HIGHER LEARNING 68, 70 (2006).

92. Cf. *Subprime Goes to College: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 2 (Jun. 24, 2010) (testimony of Steven Eisman, Portfolio Manager, FrontPoint Financial Services Fund), available at <http://help.senate.gov/imo/media/doc/Eisman.pdf> (stating that advertisements for for-profit colleges can be found in places like casinos and homeless shelters); Edited Transcript of *Frontline: College, Inc.* (Feb. 17, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/interviews/mellow.html> (interview with Dr. Gail Mellow, President, LaGuardia Community College).

iting a direct response from viewers, driving them to contact the school.⁹³ In addition to traditional media, for-profit institutions aggressively market online, utilizing third party lead-generation vendors.⁹⁴ The content of these lead-generation sites, or educational aggregators, are neither maintained nor developed by the schools but are relied on to generate a significant number of monthly leads.⁹⁵

While there are no regulations prohibiting marketing or advertising of colleges and universities, prior DOE regulations and statutory language added to the Higher Education Act contained guidelines for proprietary schools.⁹⁶ Provisions state that institutions may face fines, suspension, or termination of their Title IV funding if they engage in substantial misrepresentation regarding educational programs, financial charges, or employment prospects for graduates.⁹⁷ The Higher Education Amendments of 1986 created civil penalties for institutions engaging in fraudulent misrepresentation⁹⁸ but created no federal private right of action, which would enable students to file suits directly against offending institutions.⁹⁹ Rather, students wishing to file individual actions concerning fraudulent misrepresentation are relegated to filing suit under state consumer protection laws or lodging complaints with the DOE.¹⁰⁰

In 2007, the California Attorney General's Office entered into a stipulated agreement with Corinthian Colleges, Inc. for violations of California state education and consumer laws.¹⁰¹ The state contended that

93. See Edited Transcript of *Frontline: College, Inc.* (Feb. 17, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/interviews/mellow.html> (interview with Dr. Gail Mellow, President, LaGuardia Community College).

94. See Transcript of *All Things Considered: For-Profit Schools Retooling Recruitment Strategy*, National Public Radio (Dec. 8, 2010), available at <http://www.npr.org/2010/12/08/131913216/For-Profit-Schools-Retool-Recruitment> (explaining that although most for-profit schools buy information from third-party generation vendors, many of these leads are unreliable).

95. See *id.* (explaining that many for-profit schools are now refocusing their recruitment strategies and beginning to generate their own leads in order to entice students who are more likely to be successful).

96. See 34 C.F.R. §§ 668.71–74 (2010).

97. See 34 C.F.R. §§ 668.72 (nature of educational program), 668.73 (nature of financial charges), 668.74 (employability of graduates), 668.84 (fine proceedings), 668.85 (suspension proceedings), 668.86 (limitation or termination proceedings) (2010).

98. Higher Education Amendments of 1986, Pub. L. No. 99-498, sec. 407, § 1094, 100 Stat. 1268, 1490 (assessing civil penalties of up to \$25,000 for each violation).

99. See *id.* at sec. 487 (granting only the Secretary of Education the power to impose civil fines or violations).

100. *Waste, Fraud and Abuse in the For-Profit Education Sector: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 13–14 (2010) (testimony of Margaret Reiter, former Deputy Att'y Gen., Office of California Attorney General), available at <http://help.senate.gov/imo/media/doc/Reiter.pdf>.

101. *Id.* at 1–2.

Corinthian violated laws regarding the misrepresentation of employment opportunities and program costs to students.¹⁰² Specifics of the complaint included allegations that representatives from the school overstated potential salaries by over 200 percent.¹⁰³ Per the terms of the stipulated agreement, Corinthian Colleges paid over \$6.6 million and was enjoined from continuing any misleading behaviors.¹⁰⁴ At no time did Corinthian admit to any wrongdoing.¹⁰⁵

The DOE's new Program Integrity rules strengthen existing regulations that address misrepresentation in advertising and promotional materials.¹⁰⁶ The new rules also broaden the definition of misrepresentation to include both direct and indirect statements of an erroneous, false, or misleading nature.¹⁰⁷ This change holds an eligible institution liable not only to a prospective student hearing an advertisement *but also* to a prospective student who did not hear the advertisement directly from the institution, but instead learned about the false advertisement from a secondary source.¹⁰⁸ If enforced as written, this expanded definition of misrepresentation will protect students from misrepresentations provided by third party vendors such as online lead-generation sites.¹⁰⁹

While the new regulations broaden the scope of misrepresentation and provide students protection against misrepresentations made by affiliates and third parties, they do not create an independent cause of action and still permit the DOE to use its discretion regarding enforcement.¹¹⁰ It is noteworthy that the key players in the for-profit sector are already taking steps to align themselves with the spirit of the new regulations.¹¹¹ After

102. *Id.* at 2 (articulating the difficulty of successfully prosecuting for-profit colleges).

103. *See id.* at 10–11.

104. *Id.* at 12. Five-million-eight-hundred-thousand was paid in restitution to students while five-hundred-thousand was deposited into a state unfair competition fund. *Id.* Additionally, Corinthian was required to discontinue the lowest performing nine programs for a minimum period of eighteen months. *Id.*

105. *Waste, Fraud and Abuse in the For-Profit Education Sector: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 1 (2010) (testimony of Margaret Reiter, former Deputy Att'y Gen., Office of California Attorney General), available at <http://help.senate.gov/imo/media/doc/Reiter.pdf>.

106. *See* Program Integrity Issues, 75 Fed. Reg. 66,832, 66,958 (Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.71).

107. *Id.* at 66,958–59.

108. Program Integrity Issues, 75 Fed. Reg. 34,806, 34,834–35 (Jun. 18, 2010).

109. *See* Program Integrity Issues, 75 Fed. Reg. 66,832, 66,916 (Oct. 29, 2010) (discussing comments submitted on proposed regulations and changes being made to §§ 669.71(b), (c)).

110. *Id.* at 66,915.

111. Transcript of *All Things Considered: For-Profit Schools Retooling Recruitment Strategy*, National Public Radio (Dec. 8, 2010), available at <http://www.npr.org/2010/12/08/131913216/For-Profit-Schools-Retool-Recruitment>.

publication of the final Program Integrity rules, the UOP purchased an online lead-generation company, hoping to have more control over the content of the site and ultimately generate higher quality leads.¹¹²

Students of for-profit colleges are also protected by FTC regulations, which set forth guidelines for consumers.¹¹³ These regulations detail what constitutes deceptive advertising, promotional, marketing, and sales practices for private vocational schools.¹¹⁴ The DOE considered the FTC regulations when crafting the Program Integrity rules and used them as the basis for the definition of substantial misrepresentation: “any misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person’s detriment.”¹¹⁵ This misrepresentation definition specifically applies to the nature of the educational program, financial charges, and employability upon graduation.¹¹⁶

B. *Valuation of the Degree*

Misrepresentation concerning the value of a degree can manifest in three distinct ways. The first is a school’s false representation of accreditation status or a potential graduate’s ability to qualify for a professional license.¹¹⁷ The second is misrepresenting the ability to transfer credits,¹¹⁸ and the third is an institution’s overstatement of employment opportunities after graduation.¹¹⁹ Prior DOE regulations provided minimal rules regarding false, misleading, or erroneous representations made to students regarding these matters.¹²⁰ The new regulations enhance these prohibitions, using more specific language.¹²¹

The language of the final Program Integrity rules requires schools to make various disclosures regarding accreditation when asked.¹²² The

112. *See id.* (illustrating the ultimate motive is not compliance, but increased profit through better leads).

113. Guides for Private Vocational and Distance Education Schools, 16 C.F.R. § 254 (2010).

114. *Id.*

115. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.71(c)).

116. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (Oct. 29, 2010) (to be codified at 34 C.F.R. §§ 668.72, 668.73, 668.74).

117. Nature of Educational Program, 34 C.F.R. §§ 668.72(a), (c)(2) (2010).

118. *Id.* § 668.72(b).

119. Employability of Graduates, 34 C.F.R. § 668.74 (2010).

120. *See* Nature of Educational Program, 34 C.F.R. § 668.72 (2010); Employability of Graduates, 34 C.F.R. § 668.74 (2010).

121. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.72).

122. *See* Program Integrity Issues, 75 Fed. Reg. 34,806, 34,835 (Jun. 18, 2010).

rules expand the current provision covering disclosure of examination requirements for receiving a local, state, or federal license; mandates disclosure of whether the course work completed at the school qualifies a student to meet employment requirements,¹²³ and clarifies conditions under which credits from another institution will be accepted.¹²⁴ The DOE identified these areas as requiring the utmost transparency from for-profit colleges to ensure students are truly aware of the value of the program in which they are enrolling.¹²⁵

There are numerous examples of students who have enrolled at a for-profit college only to find upon completion that they were responsible for varying amounts of student loan debt and held a degree that provided no credentials.¹²⁶ For example, Sherry Hafferkamp wanted her master's degree in psychology.¹²⁷ Persuaded by an Argosy University admissions counselor's enticement of earning a doctorate, and pressured to make her decision quickly because only two spaces remained, she enrolled in the doctorate program at Argosy University in North Dallas, Texas.¹²⁸ At the time of enrollment, Ms. Hafferkamp was assured that the degree from Argosy would be accredited by the American Psychological Association (APA), but Argosy never received the accreditation it expected to receive from the APA.¹²⁹ Because the program was not accredited, her completed degree does not allow her to legally practice as a psychologist in Maryland, where she now lives.¹³⁰ Ms. Hafferkamp is currently trying to make ends meet while paying down over \$100,000 in federal student loans.¹³¹

Equally distressing is the story of Yasmine Issa. Ms. Issa, a single mother, testified directly before the HELP committee.¹³² Upon success-

123. *Id.*

124. *Id.*

125. *Id.* at 34,834.

126. See, e.g., Complaint at 39, *Montgomery v. Corinthian Colls., Inc.*, No. 10CH50281 (Ill. Cir. Ct. filed Nov. 23, 2010), 2010 WL 4815908 (a class action complaint alleging that defendant for-profit educational institutions engaged in fraudulent and deceptive practices in an effort to sell an education with little, if any, value); Transcript of *Frontline: College Inc.* (WGBH Educational Foundation television broadcast May 4, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/etc/script.html>.

127. Transcript of *Frontline: College Inc.* (WGBH Educational Foundation television broadcast May 4, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/etc/script.html>.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 1 (June 24, 2010) (testimony of Yasmine Issa), available at <http://help.senate.gov/imo/media/doc/Issa.pdf>.

fully completing an ultrasound sonographer program at the Sanford-Brown Institute, she learned that the degree did not provide her the necessary credentials to sit for the state certification exam.¹³³ In addition, Ms. Issa discovered that Sanford-Brown's program was not accredited with the American Registry for Diagnostic Medical Sonographers, and that fact made her unemployable as a sonographer.¹³⁴ Ms. Issa is a victim of circular logic: no one will hire her without certification, and she cannot get certified without full-time work in the field or an accredited degree.¹³⁵ Two years post-graduation, Ms. Issa has yet to work in her chosen field and owes over \$21,000 for a program that provided no benefit.¹³⁶ After DOE officials reviewed public comments on the proposed regulation specifically mentioning Ms. Issa's predicament, the DOE changed the proposed rules.¹³⁷ In order to call direct attention to this issue of licensing, the final version of the proposed rule states that a failure to disclose specialized accreditation requirements is a form of misrepresentation.¹³⁸

The second misrepresentation concerning the value of a degree is the ability for a student to transfer credits from or to a for-profit institution.¹³⁹ This is a worry for students and often an area where schools do not provide accurate or complete information.¹⁴⁰ Prior regulations provided only that schools needed to refrain from misleading students regarding transferability of credits from their own institution.¹⁴¹ New Program Integrity rules are expanded to include statements made concerning accepting transfer credits from other schools, as well as clarifying disclosure requirements.¹⁴² Complaints arising out of transferability of credits usually occur once a student learns the degree he or she received will not allow the student to qualify for licensing, employment, or addi-

133. *Id.* at 1–2. In order for Ms. Issa to take the sonographer licensing exam, she was required to either have one year of work experience or a bachelor's degree. *Id.*

134. *Id.* at 2.

135. *Id.* Shortly after graduating from Sanford-Brown, Ms. Issa learned that a local community college offered an accredited degree for sonographers for half the price. *Id.*

136. *Id.*

137. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,919 (Oct. 29, 2010) (addressing remarks provided during the comment period pertaining to proposed § 668.72).

138. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.72(n)).

139. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.72(b)).

140. Complaint at 2, *Miller v. Corinthian Colls., Inc.*, No 100918220 (Utah D.C. filed Sept. 24, 2010), 2010 WL 4818792; *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 1 (June 24, 2010) (testimony of Yasmine Issa), available at <http://help.senate.gov/imo/media/doc/Issa.pdf>.

141. Nature of Educational Program, 34 C.F.R. § 668.72(b) (2010).

142. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.72(b)(2)).

tional degrees.¹⁴³ In these cases students are not only unqualified for the career they trained for, but also cannot transfer the credits completed to a school that *will* qualify them. An illustration of this predicament is Michelle Zuver.¹⁴⁴ Ms. Zuver completed a bachelor's degree in criminal justice only to discover that no law enforcement agency she applied to would recognize her degree.¹⁴⁵ Now, \$86,000 in debt, she is willing to attend an accredited program in order to qualify for a job in her chosen field but not a single credit from the for-profit school will transfer.¹⁴⁶

The third misrepresentation applies to statements made to graduates regarding employability.¹⁴⁷ The new regulations prohibit schools from speaking to students about employment without explicit knowledge of current or future conditions, salaries, or employment opportunities.¹⁴⁸ Likewise, for-profit colleges are now curbed from misrepresenting em-

143. Complaint at 21–22, *Miller v. Corinthian Colls, Inc.*, No 100918220 (Utah D.C. filed Sept. 24, 2010), 2010 WL 4818792; *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 9 (Sept. 30, 2010) (testimony of Lauren Asher, President, Institute for College Access & Success), available at <http://help.senate.gov/imo/media/doc/Asher.pdf>.

144. *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 9 (Sept. 30, 2010) (testimony of Lauren Asher, President, Institute for College Access & Success), available at <http://help.senate.gov/imo/media/doc/Asher.pdf>.

145. *Id.*

146. *Id.* While the federal regulations provide no individual cause of action, the California legislature did attempt to give students harmed by misrepresentation regarding transferability statutory protection that would have allowed for a suit to be filed. *Daghlian v. DeVry Univ., Inc.*, 582 F. Supp. 2d 1231, 1237–38 (C.D. Ca. 2007). Although the California provisions provided protection to students by requiring transfer policies to be in writing, the California legislature chose to apply the regulations *only* to schools not accredited by the local accrediting body. *Id.* at 1237–38. This choice led to the judicial determination that the state law violated the commerce clause by restricting interstate commerce. *Id.* at 1241–42. Similarly, in a lawsuit filed by the UOP, it was alleged that Florida's statute allowing only Florida corporations to apply for the required accreditation violated the commerce clause. Plaintiff's Motion for Summary Judgment at 1, *The Univ. of Phoenix v. Bradley*, No. 4:08-cv-00217-RH-WCS (N.D. Fla. Nov. 24, 2008), 2008 WL 8045858. These two cases highlight the complex issue of accreditation concerning for-profit schools and the problems that arise because there is no single accrediting body but rather a web of regional accrediting bodies. The creation of a single accrediting body is beyond the scope of this Comment, but identifies a potential solution to inequality in program performance and would allow credits to transfer more freely across institutions.

147. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959–60 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.74); see also Program Integrity Issues, 75 Fed. Reg. 66,832, 66,919 (Oct. 29, 2010) (discussing the testimony of Yasmine Issa and the DOE's response).

148. See Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.74(c)) (specifically addressing representations made by the institution regarding knowledge of employment opportunities and compensation rates).

ployability through advertisements that lead perspective students to think the school will train them for a specific job.¹⁴⁹ Phrases such as “[m]en/women wanted to train for,” “[h]elp [w]anted,” or “[b]usiness [o]pportunities” will now face scrutiny by the DOE.¹⁵⁰ In order to offer further protection from misrepresentation, the new regulations leave intact prior provisions prohibiting false statements regarding: job placement services, publication of government statistics, and a school’s relationships to placement agencies.¹⁵¹ In addition, the program participation agreement (PPA) provides that any job placement rates used in advertising must be made available to potential students so students may substantiate the truthfulness of the claims.¹⁵² This is yet another way the DOE hopes to encourage transparency.

Promulgation of strict misrepresentation guidelines are not the only way the DOE seeks to end the usage of misleading statements to students. As part of the new rules, the DOE developed mandatory reporting and disclosure guidelines for all for-profit schools.¹⁵³ The new disclosure and reporting guidelines attempt to standardize the means by which schools report graduation rates, placement rates, program costs, average student debt, and occupation profiles.¹⁵⁴ A standardized approach to disclosure will allow students to compare costs and programs across various schools, giving them the information necessary to make informed choices. As an initial step, the new rules set to take effect in

149. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.74(d)).

150. *Id.*

151. Employability of Graduates, 34 C.F.R. § 668.74 (2010).

152. 20 U.S.C. § 1094(a)(8) (2006). This provision was part of the Higher Education Amendments of 1986 that set out the initial requirements of PPAs. Higher Education Amendments of 1986, Pub. L. No. 99-498, sec. 407, § 1094(a), 100 Stat. 1268, 1488. This condition also includes language stating that state-licensing requirements for an occupation must be provided to students. 20 U.S.C. § 1094(a)(8) (2006).

153. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,948 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.6); *see also* Program Integrity Issues, 75 Fed. Reg. 66,832, 66,835 (Oct. 29, 2010). Comments provided on the new disclosure requirements questioned the fact that this new provision applies only to for-profit schools. *Id.* at 66,835. The DOE’s discussion clarifies that the disclosure requirement applies to all schools offering programs for gainful employment, therefore all schools that qualify for Title IV funding under §§ 102(b)–(c), 101(b)(1) of the Higher Education Act. *Id.* These sections define schools eligible for Title IV funds, which includes proprietary schools. 20 U.S.C. §§ 1001(b), 1002(a)(1)(A), 1002(b) (2006). For more information, refer to Part II of this Comment.

154. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,948–49 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.6). Occupation profiles must be a link to O*Net, a website established by the Department of Labor, which provides detailed information regarding particular jobs, the training required, and the expected salaries. *Id.* at 66,949; O*NET ONLINE, <http://online.onetcenter.org> (last visited Feb. 21, 2011).

July 2011, directs schools to prominently place the information on their websites and on printed materials.¹⁵⁵ Although there currently is no standardized format for disclosures, the DOE intends to create a mandatory disclosure form.¹⁵⁶ This future step will ensure that all information is disseminated in the same manner and in the same format and will make it easier for prospective students to make comparisons.¹⁵⁷

The stories of Sherry Hafferkamp, Yasmine Issa, and Michelle Zuver provide a glimpse into the resulting consequences of misrepresentation. They showcase fraud and misrepresentation perpetrated by for-profit institutions against students regarding the value of the degree. These examples only represent a small portion of fraudulent behaviors exhibited by proprietary schools. Students are not only misled about program accreditation and ability to qualify for employment in a chosen field, but are also consistently misled regarding program costs and the consequences of accepting federal aid.

C. *Financial Matters*

Misrepresentation of financial issues includes: fraudulent misrepresentation regarding program costs, financial aid disclosures to students, and actions taken to defraud the federal government.¹⁵⁸ The DOE seeks to control fraudulent misrepresentation by including statements concerning financial aid and program costs under new misrepresentation regulations.¹⁵⁹ The DOE believes requiring schools to accurately convey information regarding program costs and the consequences of financial aid

155. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,948–49 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.6).

156. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,833, 66,836 (Oct. 29, 2010). The DOE stipulates that until such time a form is developed, schools must comply with the regulations as they are written. *Id.* at 66,836. In addition, schools are given leeway in how they choose to report placement rates, but must inform the DOE how they intend to make the calculation. *Id.* at 66,838. This approach takes into consideration the concerns made during the comment period and will allow schools to utilize an approach already approved by states or accrediting bodies. *Id.*

157. *See id.* at 66,835–36 (pointing to the DOE's consideration of the comments on how the disclosures could be made most helpful to students in the implementation of prospective policies).

158. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.73).

159. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.73); Nature of Financial Charges, 34 C.F.R. § 668.73 (2010) (listing only two areas of financial assistance protected from misrepresentation). Prior Program Integrity regulations only regulated misrepresentations regarding financial charges as they pertained to scholarships and characterizations regarding whether specific charges were customary. Nature of Financial Charges, 34 C.F.R. § 668.73(a)–(b) (2010).

will give students vital information needed to make decisions regarding their financial commitments.¹⁶⁰

The Program Integrity rules subject several financial issues to the misrepresentation clause, including but not limited to: program costs, institutions' refund policies, and availability or nature of financial assistance.¹⁶¹ The rule also covers misrepresentation regarding a student's loan repayment responsibilities, regardless of program completion or employment, and a student's ability to accept or reject any funds offered by the school in the form of federal loans.¹⁶²

A GAO undercover investigation provided first-hand evidence of fraudulent behavior regarding financial aid.¹⁶³ In the evaluation of fifteen proprietary schools, GAO investigators experienced misrepresentations regarding program costs as well as acts resulting in fraudulent submission of financial aid applications.¹⁶⁴ Investigators documented that representatives from nine of the fifteen schools provided deceptive statements regarding program costs.¹⁶⁵ One school quoted the investigator a yearly cost of \$12,000 for a two year program, but when the investigator asked about the total program cost, school officials revealed the total cost was \$30,000.¹⁶⁶ This is evidence of the school's desire to mislead the student.¹⁶⁷ The GAO investigators also noted that seventy percent of the schools either declined to provide applicants access to

160. Program Integrity Issues, 75 Fed. Reg. 34,806, 34,849 (June 18, 2010).

161. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.73).

162. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,959 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.73(d), (e)).

163. *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 7–9 (2010), (statement of Gregory D. Kuntz, Managing Director Forensic Audits and Special Investigations, U.S. Government Accountability Office), available at <http://www.gao.gov/new.items/d10948t.pdf>. In response to the government exposé, Everest College, owned and operated by Corinthian Colleges, has begun to secretly shop its own campuses with the intention of using this footage to catch and fire employees violating policies. Richard Danielson, *State Opens Civil Inquiry into 5 For-Profit Colleges*, ST. PETERSBURG TIMES, Oct. 21, 2010, at 9B, available at 2010 WLNR 21060061.

164. *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 7 (2010) (statement of Gregory D. Kuntz, Managing Director Forensic Audits and Special Investigations, U.S. Government Accountability Office), available at <http://www.gao.gov/new.items/d10948t.pdf>.

165. *Id.* at 11.

166. *Id.*

167. *See id.* (pointing out the deliberate nature of the misleading information provided by the college representatives).

financial aid availability or directly misled students regarding the responsibilities inherent to government loans.¹⁶⁸

On several occasions, school representatives misrepresented to the GAO investigator the student's responsibility for repaying financial aid and assisted students in committing fraud.¹⁶⁹ Applicants were encouraged to lie on their Free Application for Federal Student Aid (FAFSA) by increasing dependents or omitting assets.¹⁷⁰ In one instance, a student was told that the financial aid representative would erase the \$250,000 he claimed as savings so he could qualify for federal loans.¹⁷¹ Another undercover student was advised that she could request the maximum amount of loans, regardless of need, and place any remaining monies in a high yield savings account.¹⁷²

In addition to these fraudulent actions, there are many reports of for-profit institutions denying refunds, failing to report student withdrawals, or generally delaying a student's withdrawal until they are ineligible to receive a refund.¹⁷³ By engaging in these fraudulent practices, proprietary institutions ensure that the school maintains the federal funding although the student received no benefit.¹⁷⁴ Regardless of their lack of

168. *Id.* (cataloging abuses regarding financial aid practices by investigated institutions). Six schools refused to discuss financial aid with the undercover investigators until they completed enrollment forms, requiring that they not only complete application forms, but also pay an application fee. *Id.*

169. *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 7–8 (2010) (statement of Gregory D. Kuntz, Managing Director Forensic Audits and Special Investigations, United States Government Accountability Office), available at <http://www.gao.gov/new.items/d10948t.pdf>.

170. *Id.* at 8.

171. *Id.* at 7.

172. *Id.* at 12.

173. See *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 7–8 (June 24, 2010) (testimony of Kathleen S. Tighe, Inspector General, U.S. Department of Education), available at <http://help.senate.gov/imo/media/doc/Tighe.pdf>; see also *Hearing on Waste, Fraud and Abuse in the For-Profit Education Sector Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 11–12 (June 24, 2010) (statement of Margaret Reiter, former Deputy Attorney General, Office of California Attorney General), available at <http://help.senate.gov/imo/media/doc/Reiter.pdf>; Complaint at 2–3, *Taubenfeld v. Career Educ. Corp.*, No. 03C 8884 (N.D. Ill. Dec. 9, 2003), 2003 WL 23800572 (alleging falsification of student records including billing students for classes never attended).

174. See *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 7–8 (June 24, 2010) (testimony of Kathleen S. Tighe, Inspector General, U.S. Department of Education), available at <http://help.senate.gov/imo/media/doc/Tighe.pdf>; *Subprime Goes to College: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 4 (Jun. 24, 2010) (testimony of Steven Eisman, Portfolio Manager, FrontPoint Financial Services), available at <http://help.senate.gov/imo/media/doc/Eis>

benefit, students are responsible for this debt that is not dischargeable in bankruptcy.¹⁷⁵ Furthermore, schools manipulating withdrawal dates and falsifying records are in violation of eligibility requirements of the Higher Education Act.¹⁷⁶

IV. INCENTIVE COMPENSATION BANS

“Greed captures the essence of the evolutionary spirit.”¹⁷⁷

As discussed above, proprietary schools function as corporations—focusing on maximizing profit.¹⁷⁸ Schools realize income from federal aid programs after fourteen days from the start of the term, so they are incentivized to enroll students and ensure they stay enrolled for two weeks so they are not compelled to return the federal aid.¹⁷⁹ To maximize profits, for-profit schools focus on student growth—this places substantial importance on efforts of recruiters and admissions personnel.¹⁸⁰ As the market for proprietary institutions grows more crowded with competitors, schools resort to using whatever methods are available to get students enrolled.¹⁸¹

man.pdf; see also *Hearing on Waste, Fraud and Abuse in the For-Profit Education Sector Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 13 (June 24, 2010) (testimony of Margaret Reiter, former Deputy Attorney General, Office of California Attorney General), available at <http://help.senate.gov/imo/media/doc/Reiter.pdf>.

175. *Hearing on Waste, Fraud and Abuse in the For-Profit Education Sector Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 13 (June 24, 2010) (testimony of Margaret Reiter, former Deputy Attorney General, Office of California Attorney General), available at <http://help.senate.gov/imo/media/doc/Reiter.pdf>. Defaulting on a student loan attaches to an individual's credit report making him or her ineligible for future student loans and limiting his or her ability to qualify to borrow money for a home or a car. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,622 (July 26, 2010).

176. Institutional Refunds, 20 U.S.C. § 1091b(b)(1) (2006) (detailing the responsibility of an institution for the return of Title IV funds).

177. WALL STREET (Twentieth Century Fox Film Corporation 1987).

178. See RICHARD S. RUCH, *HIGHER ED, INC.* 92 (2001) (arguing that proprietary institutions' profit models are beneficial due to disclosure requirements).

179. See *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 2 (Aug. 4, 2010) (statement of Joshua Pruyn, former Admissions Rep., Alta College), available at <http://help.senate.gov/imo/media/doc/Pruyn.pdf>. The DOE strengthened the requirements concerning return of Title IV funding due to withdrawal as part of the new regulations, clarifying what constitutes a withdrawal. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,951–52 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.22). A full discussion of this topic is outside the scope of this Comment.

180. See Joshua Woods, *Opportunity, Ease, Encouragement, and Shame: A Short Course in Pitching For-Profit Education*, CHRON. OF HIGHER EDUC., THE CHRON. REV., Jan. 13, 2006, at 10, available at <http://chronicle.com/article/Opportunity-Ease/13800>.

181. See also *Subprime Goes to College: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 5 (Jun. 24, 2010) (statement of Steven Eisman, Portfolio Manager, FrontPoint Financial Services), available at <http://help.senate.gov/imo/>

In 1992, Congress responded to reports of high-pressure tactics used in recruiting at for-profit schools by legislating a ban on enrollment-based compensation (incentive compensation bans).¹⁸² Regulations passed by the DOE in 2002 weakened the impact of the ban by creating twelve safe harbor provisions.¹⁸³ The safe harbors exempted activities traditionally considered incentive pay.¹⁸⁴ This made it difficult for institutions to take the legislative changes seriously and caused confusion about what constituted a violation of the compensation ban.¹⁸⁵ Examples of the safe harbors include: exempting incentive pay for enrollment of non-Title IV students; providing compensation for signing institutional contracts; incentives based on student completion of one year of a program; incentive pay for clerical “pre-enrollment” activities; token gifts under \$100; incentives for internet enrollments; and payments to third parties.¹⁸⁶ The final Program Integrity rules remove the safe harbors, thus meeting the original goals of Congress.¹⁸⁷

The removal of the safe harbor provisions eliminates the government-sanctioned road map for evading the incentive compensation ban and signals to for-profit colleges that compensation based on quantitative variables will not be tolerated. The DOE intends to utilize a two-part test to determine if a school’s compensation plan violates the regulation.¹⁸⁸ The first part questions whether a payment is made for services rendered, i.e., an incentive payment, and the second question asks if that payment is based directly or indirectly on actions taken to enroll a student or secure a financial aid award.¹⁸⁹ Payments will be considered in violation of the incentive compensation ban if the answer to both questions is yes.¹⁹⁰ Another safeguard added to the incentive compensation ban is the presump-

media/doc/Eisman.pdf (suggesting that for-profit colleges are completely incentivized by volume rather than quality, and explaining why for-profit colleges account for such low satisfaction rates).

182. Higher Education Amendments of 1992, Pub. L. No. 102-325, sec. 490, § 487(a), 106 Stat. 448, 625 (codified at 20 U.S.C. § 1094(a)(20) (2006)).

183. 34 C.F.R. § 668.14(b)(22)(ii)(A)–(L) (2009).

184. Program Integrity Issues, 75 Fed. Reg. 34,806, 34,816 (proposed Jun. 18, 2010).

185. See *id.* at 34,816–17 (proposing statutory revision to assuage confusion by providing a clear prohibition against “any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any person or entity engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance”).

186. 34 C.F.R. § 668.14(b)(22)(ii)(B)–(C), (E)–(F), (H), (J)–(L) (2009).

187. See Program Integrity Issues, 75 Fed. Reg. 66,832, 66,950 (Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.14(b)(22)) (amending the PPA by making revisions in accordance with original mandate “regarding the award of title IV, HEA program funds”).

188. *Id.* at 66,876.

189. *Id.*

190. *Id.*

tion that multiple salary increases within one year are based purely on enrollment performance, and therefore will be considered in violation of the regulation.¹⁹¹

Previously, schools crafted compensation to fit within the safe harbors but worked the system in a way that allowed them to incentivize enrollment, thus placing numbers above the best interest of the students.¹⁹² The misrepresentations discussed above directly flow from the compensation structure of admissions representatives.¹⁹³ With pressure on admissions representatives to achieve enrollments, students are met with high-pressure sales tactics and often do not obtain the guidance necessary to allow them to make informed decisions.¹⁹⁴

Increased complaints to the DOE and a rise in litigation are two of the consequences of the safe harbors. Litigation, in the form of *Qui Tam*¹⁹⁵ suits, are commenced under the False Claims Act.¹⁹⁶ These whistleblower lawsuits allege violations of the compensation ban by former employees of for-profit colleges, and raised the legal question regarding the significance of PPAs.¹⁹⁷ PPAs are “mandatory agreement[s] between the school and the DOE which ‘shall condition the initial and continuing eligibility of the school to participate in a program upon compliance with’ specific statutory requirements.”¹⁹⁸

191. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,950 (Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.14(b)(22)(i)(B)).

192. See Program Integrity Issues, 75 Fed. Reg. 34,806, 34,817 (proposed Jun. 18, 2010) (describing institutional manipulation of the first safe harbor provision which prohibits incentive payment based solely upon securing enrollment); *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005) (stating that by basing compensation on enrollments, recruiters are encouraged to enroll students who are not qualified academically or financially).

193. See Program Integrity Issues, 75 Fed. Reg. 34,806, 34,817 (proposed Jun. 18, 2010) (noting that “[w]hen admissions personnel are compensated substantially, if not entirely, upon the numbers of students enrolled, the incentive to deceive or misrepresent the manner in which a particular educational program meets a student’s need increases substantially”).

194. See *id.*

195. BLACK’S LAW DICTIONARY 1282 (8th ed. 2009) (defining *Qui Tam* as “[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive”).

196. See generally 31 U.S.C. § 3729 (2006) (providing a cause of action against any individual who knowingly makes a false statement or claim in an attempt to secure payment).

197. See, e.g., *United States ex rel. Graves v. ITT Educ. Serv., Inc.*, 284 F. Supp. 2d 487, 490 (S.D. Tex. 2003) (examining ITT’s “incentive salary structure” offered to admissions and recruitment employees), *aff’d per curiam*, 111 Fed. App’x 296 (5th Cir. 2004).

198. 20 U.S.C. § 1094(a) (2006).

Circuit courts are split as to whether employees of for-profit colleges have standing to bring suits under the False Claims Act.¹⁹⁹ This controversy stems from the characterization of the disclosures made by schools in their PPAs.²⁰⁰ In order for a fraudulent misrepresentation action to stand under the False Claims Act, the misrepresentation has to be a false record or material statement made to the government in order to secure funds.²⁰¹ Schools claim that the statements contained in PPAs are not “certifications of compliance with either the incentive ban or accreditation requirements.”²⁰² Instead, they assert that executing a PPA with the DOE is merely a requirement for participation in the award of Title IV funds.²⁰³ In essence, they argue there is no stipulation within the PPA providing that payment is contingent on compliance with the regulations.²⁰⁴

In *United States ex rel. Graves v. ITT Educational Services, Inc.*,²⁰⁵ the Fifth Circuit upheld the use of a two-part test to determine availability of a claim under the False Claims Act.²⁰⁶ The test required that the school “knowingly [makes a] false certification of compliance with a statute or regulation and that certification is a prerequisite to payment.”²⁰⁷ The court held that a PPA does not require a participating school to certify that they are in compliance with the incentive ban in order to receive Title IV funds; therefore, the false statements in the PPA are not violations of the False Claims Act.²⁰⁸ Based on this analysis, the Fifth Circuit affirmed the lower court’s dismissal of a complaint by former employees

199. *United States ex rel. Powell v. Am. Intercont’l Univ., Inc.*, No. 1:08-CV-2277-RWS, 2010 WL 2245574, at *2–3 (N.D. Ga. June 2, 2010) (discussing the circuit split between the Seventh Circuit and the Ninth Circuit); *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005); *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166 (9th Cir. 2006).

200. *Powell*, 2010 WL 2245574, at *2.

201. 31 U.S.C. § 3729(a)(2) (2006).

202. *Powell*, 2010 WL 2245574, at *2; *see Graves*, 284 F. Supp. 2d at 500, 502.

203. *Powell*, 2010 WL 2245574, at *2; *see Graves*, 284 F. Supp. 2d at 502 (finding the requirements of the PPA are only a condition of participation eligibility, rather than a certification of certain facts to the DOE).

204. *Powell*, 2010 WL 2245574, at *2; *see Graves*, 284 F. Supp. 2d at 502.

205. 284 F. Supp. 2d 487, 502 (S.D. Tex. 2003), *aff’d per curiam*, 111 Fed. App’x 296 (5th Cir. 2004).

206. *See Graves*, 111 Fed. App’x at 297 (*per curiam*) (affirming the lower court’s decision on the grounds stated in the memorandum opinion); *Graves*, 284 F. Supp. 2d at 498 (defining the necessary elements for a False Claims Act claim).

207. *Graves*, 284 F. Supp. 2d at 498 (reviewing the general terms and conditions section of the PPA to determine if compliance with the compensation ban requires certification).

208. *Id.* at 500–01.

of ITT.²⁰⁹ The employees alleged that ITT's policies violated the compensation ban by establishing salaries based on five to ten percent of earned revenues.²¹⁰ Additionally, the court ruled that there was no fraud in the actual request for payment made under Title IV.²¹¹

After the Fifth Circuit's ruling, the Seventh Circuit, Ninth Circuit, and the Northern District of Georgia held that former employees may claim a cause of action under the False Claims Act based on misrepresentations made in PPAs.²¹² These courts established the theory of promissory fraud as a cause of action under the False Claims Act and stated that it is irrelevant that the fraud occurred prior to the actual request for loans.²¹³ The Ninth Circuit, in *United States ex rel. Hendow v. University of Phoenix*,²¹⁴ stated that four factors are required to state a claim under the theory of promissory fraud.²¹⁵ These factors are: (1) a false statement was made; (2) the fraud was perpetrated with knowledge; (3) the fraud was material; and (4) the statement caused the government to disburse monies.²¹⁶ While schools argue that the incentive ban is not material because the PPA is "a condition of *participation*, not a condition of *payment*," the court interpreted the PPA as a prerequisite to federal funding.²¹⁷ The court held that any violation of the PPA disqualifies the school from receiving Title IV funds.²¹⁸ Under this theory, because the school received funding under fraudulent circumstances, the school was liable under the False Claims Act.²¹⁹ The court also dismissed the notion

209. *Graves*, 111 Fed. App'x at 297 (per curiam).

210. *Graves*, 284 F. Supp. 2d at 490 (defining "earned revenue" as monies earned by continuing students and new enrollments). ITT's "incentive salary structure" offered employees "5% of earned revenues for Inside Representatives and 10% of earned revenues for Outside Representatives." *Id.*

211. *Id.* at 496, 504.

212. *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1177–78 (9th Cir. 2006) (agreeing with the Seventh Circuit that an institution which knowingly commits fraud in the PPA can be held liable under the False Claims Act); *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005) (determining that because a failure to comply with PPAs would prohibit schools from receiving government funds, any fraud contained within the PPA makes the school amenable to claims under the False Claims Act); *United States ex rel. Powell v. Am. InterCont'l Univ., Inc.*, No. 1:08-CV-2277-RWS, 2010 WL 2245574, at *3 (N.D. Ga. June 2, 2010) (furthering the reasoning of the Seventh and Ninth Circuits in upholding a cause of action for fraudulently submitting a PPA).

213. *Hendow*, 461 F.3d at 1174; *Main*, 426 F.3d at 916; *Powell*, 2010 WL 2245574, at *2.

214. 461 F.3d 1166, 1174 (9th Cir. 2006).

215. *Hendow*, 461 F.3d at 1174.

216. *Id.*

217. *Id.* at 1176 (emphasis in original).

218. *See id.*

219. *See id.*

that the term “certification,” used by the Fifth Circuit, is implicit to materiality.²²⁰

The facts of *Hendow*²²¹ exhibit the particularly troubling nature of the blatant violations of the ban on incentive compensation. In 2004, Mary Hendow and Julie Albertson, former employees of UOP, filed suit against the school alleging that UOP continually submitted PPAs that attested to its compliance with the incentive compensation ban while knowingly violating the ban.²²² They charged that UOP encouraged representatives “to enroll students without reviewing their transcripts”; ranked employees based on enrollment numbers; and offered higher salaries, benefits, incentives, and gifts to employees who met targets.²²³ In addition, they claimed UOP’s common practice consisted of keeping two sets of employee records: one showing the true compensation structure based on enrollments, and a second set containing employee reviews focusing on approved qualitative factors used for the DOE.²²⁴

After six years of litigation, UOP and the Plaintiffs submitted to a joint stipulation agreement.²²⁵ In this agreement, UOP paid the U.S. Government \$67.5 million.²²⁶ From this amount the government paid Hendow and Albertson nineteen-million dollars.²²⁷ UOP accepted no liability for

220. *Hendow*, 461 F.3d at 1172–73.

221. *Id.*

222. *Id.* at 1169.

223. *Id.* (illustrating the role incentives play in recruitment by conveying how Albertson’s salary was increased \$50,000 after achieving her target). The court documents alleged that UOP tied compensation to enrollments as well as providing trips and electronics for high performers. *Id.*

224. *Id.*

225. Supplemental Joint Stipulation of Dismissal and [Proposed] Order at 1–2, United States *ex rel.* Hendow v. Univ. of Phoenix, No. 203-CV-00457, (E.D. Cal. Dec. 16, 2009), 2009 WL 5431573.

226. Settlement Agreement at 3, United States *ex rel.* Hendow v. Univ. of Phoenix, No. 203-cv-00457 (E.D. Cal. Dec. 16, 2009), 2009 WL 6528368. This was not the first time UOP paid the DOE for violations of the incentive compensation ban. In 2004, UOP paid the DOE \$9.8 million to settle claims in response to a Program Review Report that identified several violations of the incentive compensation ban. Joshua Woods, *Opportunity, Ease, Encouragement, and Shame: A Short Course in Pitching For-Profit Education*, CHRON. OF HIGHER EDUC., THE CHRON. REV., Jan. 13, 2006, at 10; *see also* U.S. DEPT. OF EDUC., PROGRAM REVIEW REPORT, PRCN 200340922254, UNIV. OF PHOENIX 7–27 (2003), available at <http://www.kroplaw.com/uop/DOE.report.on.UOP.pdf>. The 2003 DOE report details UOP’s pay stacking structure, aggressive sales training techniques, prizes and other awards based on enrollment, and the cover-up that occurred during the investigation. U.S. DEPT. OF EDUC., PROGRAM REVIEW REPORT, PRCN 200340922254, UNIV. OF PHOENIX 7–27 (2003), available at <http://www.kroplaw.com/uop/DOE.report.on.UOP.pdf>.

227. Settlement Agreement at 3, United States *ex rel.* Hendow v. Univ. of Phoenix, No. 203-CV-00457 (E.D. Cal. Dec. 16, 2009), 2009 WL 6528368.

the accusations and made no concessions to alter policies.²²⁸ Additionally, as a condition of the agreement, the DOE was barred from taking further action to investigate or sanction UOP for the alleged behaviors.²²⁹

Recently, graphic examples of incentive ban violations perpetrated by for-profits have come to the public's attention.²³⁰ Former admissions representatives from both Education Management Corporation and Alta Colleges testified before the Senate Subcommittee on Health, Education Labor and Pensions describing the financial incentives tied to enrollment.²³¹ Josh Pruyn, former Admissions Representative at Alta College's Westwood College, exposed company emails detailing the incentives used to push enrollments.²³² Westwood routinely incentivized its agents by creating competitions amongst groups, offering baseball tickets or dinners to individuals who met enrollment goals, or threatening humiliation to those who did not.²³³ Pruyn describes a high paced sales environment where the pressure was on to enroll students regardless of qualifications.²³⁴ The description of the enrollment process provided by employees is the embodiment of the concern highlighted by Judge Easterbrook in the *United States ex rel. Main v. Oakland City University* ruling: that incentive compensation will lead to enrollment of "poorly qualified students who . . . derive little benefit from the subsidy and may be . . . unwilling to repay federally guaranteed loans."²³⁵

228. *Id.* at 2.

229. *Id.* at 4.

230. *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 3 (2010) (testimony of Joshua Pruyn, former Admissions Rep., Alta College), available at <http://help.senate.gov/imo/media/doc/Pruyn.pdf>; Class Action Complaint at 16–22, Bernal v. Burnett, No. 10-CV-01917 (D. Colo. filed Aug. 11, 2010), 2010 WL 3940944.

231. *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 2–3 (2010) (testimony of Kathleen A. Bittel, employee, Education Management Corporation), available at <http://help.senate.gov/imo/media/doc/Bittel.pdf>; *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 2 (2010) (testimony of Joshua Pruyn, former Admissions Rep., Alta College), available at <http://help.senate.gov/imo/media/doc/Pruyn.pdf>.

232. *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 2–13 (2010) (attachments to the testimony of Joshua Pruyn, former Admissions Rep., Alta College), available at <http://help.senate.gov/imo/media/doc/Pruyn%20Attachments.pdf>.

233. *Id.* at 2–3, 9–10, 12.

234. *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 1–3 (2010) (testimony of Joshua Pruyn, former Admissions Rep., Alta Coll.), available at <http://help.senate.gov/imo/media/doc/Pruyn.pdf> (recalling how counselors were told to enroll a student as long as they had a GED and \$100).

235. *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005) (articulating concern regarding unchecked violations of the incentive compensation bans).

The DOE's new rules remove the safe harbors and require schools to review their recruitment methods; but loop holes and ambiguities persist. First, the legal significance of PPAs in relation to the False Claims Act is not clarified. Determination that statements contained in the PPA subject schools to liability under the False Claims Act would create another safeguard against abuses and place more pressure on schools to comply. Second, the final Program Integrity rules exempt payments made to third party lead-generation websites from regulatory protection under incentive compensation bans.²³⁶ In doing nothing to curb lead-generation websites, no steps are taken to shield students from the overzealous contact methods used by recruiters.²³⁷

The overarching goal of the DOE is to push for-profit institutions of higher education into enrolling well-informed students who will benefit from programs without placing such a high incentive on obtaining enrollment numbers.²³⁸ While this intention has merit, due to the catch-22 of the for-profit colleges, it is highly unlikely that these schools will abandon their profit model altogether. The catch-22 of the for-profit model creates a distressing problem, but without an understanding of the overall impact of these behaviors, the discussion cannot be complete.

V. ECONOMIC IMPACT OF FRAUDULENT MISREPRESENTATIONS BY FOR-PROFIT COLLEGES

When a student chooses to attend a for-profit college without complete information, it is not only the student who suffers, but the American taxpayer as well.²³⁹ Tuition rates at for-profit colleges average more than five hundred percent of tuition at community colleges and two hundred percent of tuition at four-year state universities.²⁴⁰ Students attending

236. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,950 (Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.14(b)(22)(iii)(B)(2)) (exempting third parties as long as they take no action to pre-qualify the student).

237. See Joshua Woods, *Opportunity, Ease, Encouragement, and Shame: A Short Course in Pitching For-Profit Education*, CHRON. OF HIGHER EDUC., THE CHRON. REV., Jan. 13, 2006, at 10.

238. See Press Release, U.S. Dep't of Educ., Obama Administration Proposes Student Aid Rules to Protect Borrowers and Taxpayers; Key Elements of Gainful Employment on a Separate Track (June 16, 2010), available at <http://www.ed.gov/news/student-aid-rules-protect-borrowers-and-taxpayers>.

239. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,622 (proposed July 26, 2010).

240. TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 8-9 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>.

for-profit colleges assume more debt than their counterparts.²⁴¹ In fact, almost one hundred percent of students at for-profits graduate with debt, and almost a quarter of them graduate with over \$40,000 in debt.²⁴² Some financial experts feel student loan defaults will be the next economic bubble to burst.²⁴³

Ten percent of all students attending college are enrolled at for-profits, but these students' loan default rate accounts for forty-four percent of the federal student loans in default.²⁴⁴ This disparity in default rates reflects the increased levels of debt entered into by students who often graduate without a meaningful degree.²⁴⁵ As discussed above, the issue is compounded by the fact that these students are already disadvantaged economically and are more likely to be minorities or single parents.²⁴⁶

High levels of student debt have been shown to impact the student and the public in three main ways.²⁴⁷ These are: (1) the financial burden on

241. *Id.*

242. *Id.* at 9.

243. *Subprime Goes to College: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 3 (Jun. 24, 2010) (testimony of Steven Eisman, Portfolio Manager, FrontPoint Financial Services Fund), available at <http://help.senate.gov/imo/media/doc/Eisman.pdf>.

244. See TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 11 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf> (reflecting the default numbers for students beginning repayment in 2007 and defaulting by 2009). The GAO reports that eighteen percent of for-profit graduates default on their Title IV loans. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,618 (proposed July 26, 2010). This figure only includes students who actually complete a degree. *Id.* The default rate of students attending non-profit schools is almost a quarter of this default rate. *Id.*

245. See TOM HARKIN, CHAIRMAN OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 9 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>.

246. NAT'L CTR. FOR EDUC. STATISTICS, PROFILE OF UNDERGRADUATE STUDENTS: 2007-08, 60, 77, 81, 89 (2010), available at <http://nces.ed.gov/pubsearch/pubinfo.asp?pubid=2010205> (providing data on undergraduate student demographics). Adding to the concern about increasing default rates is the financial stability of the publicly traded for-profits. See Steve Eisman, Portfolio Manager, FrontPoint Fin. Servs. Fund, Presentation at the Ira Sohn Conference: Subprime Goes to College 6-7 (May 26, 2010), <http://insidehighered.com/content/download/350088/4329742/version/1/file/EismanSohn-Conference.doc>. The impact of default rates on stock prices and short sellers in the market place create a worry for some analysts. See *id.*

247. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,621 (July 26, 2010).

the individual; (2) the expense of loan subsidies to taxpayers; and (3) the negative effect of defaults on the individual and the taxpayer.²⁴⁸ Simply put, an individual facing the burden of a large debt does not have disposable income, and therefore, the individual is less likely to make purchases or save.²⁴⁹ A student who undertakes student loan debt after careful consideration of pertinent facts poses no public policy concern—in terms of the burden on the individual—because he or she is aware of the consequences.²⁵⁰ When a student makes decisions enticed by the availability of federal funds and is informed through misrepresentation, the government should take steps to protect the student. One way to do this is by ensuring the student has access to the most complete and accurate information, which is a key goal of the new Program Integrity rules.²⁵¹

The second concern of high debt burden is the cost to taxpayers.²⁵² This view considers the fact that taxpayers subsidize Title IV federal loans.²⁵³ When a student is unemployed or faces financial hardship, the student may request a deferment or forbearance of loans; this results in the government waiving interest payments.²⁵⁴ While deferments are beneficial for the individual, taxpayers absorb the cost.²⁵⁵ These costs can rise to almost twenty percent of the total loan cost.²⁵⁶

The third cost consideration is the impact of defaulting on both the individual and the taxpayer.²⁵⁷ In 2009, taxpayers absorbed over nine billion dollars in student loan defaults.²⁵⁸ This number increases the federal deficit and creates severe consequences for the student. A student's credit rating is destroyed, he or she may be prohibited from obtaining a professional license, his or her future wages may be garnished, tax refunds may be seized, and the individual will not qualify for future student loans.²⁵⁹

248. *Id.*

249. *See id.* at 43,621–22.

250. *Id.* at 43,621.

251. *Id.* at 43,621; *see also* Press Release, U.S. Dep't of Educ., Proposed Rule Links Federal Student Aid to Loan Repayment Rates and Debt-to-Earnings Levels for Career College Graduates (July 23, 2010), <http://www.ed.gov/news/press-releases/proposed-rule-links-federal-student-aid-loan-repayment-rates-and-debt-earnings>.

252. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,621 (July 26, 2010).

253. *Id.* at 43,621–22.

254. *Id.* at 43,622.

255. *Id.*

256. *Id.* (stating that cost of a three-year deferment can be up to twenty percent of the loan value).

257. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,621–22 (July 26, 2010).

258. *Id.* at 43,622.

259. *Id.*

The DOE proposed regulations to control the default rate and debt burden of for-profit students in July of 2010.²⁶⁰ The proposed Gainful Employment regulations seek to tackle the problem in a twofold manner.²⁶¹ The first test applies a debt-to-income ratio to determine if a student's income allows him or her to make payments on the loan.²⁶² The second proposed test is repayment rate.²⁶³ This test considers the repayment of all students who have loans originating from the institution, regardless of program completion.²⁶⁴

When the DOE released the final Program Integrity rules on October 28, 2010, it failed to release final Gainful Employment, stating the desire to hold additional public hearings.²⁶⁵ Concerns regarding the impact of these regulations on the for-profit industry spurred intense lobbying efforts in hopes of persuading the DOE to abandon the proposal.²⁶⁶

VI. CONCLUSION

The final Program Integrity rules promulgated by the DOE take a step forward in offering students protection from fraud and deceptive practices of for-profit colleges. They demand greater accountability and

260. Press Release, U.S. Dep't of Educ., Proposed Rule Links Federal Student Aid to Loan Repayment Rates and Debt-to-Earnings Levels for Career College Graduates (July 23, 2010), available at <http://www.ed.gov/news/press-releases/proposed-rule-links-federal-student-aid-loan-repayment-rates-and-debt-earnings>.

261. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,618 (proposed July 26, 2010) (summarizing proposed regulations devised to determine if a for-profit is in fact offering an education that will lead to gainful employment). Institutions that pass both tests or have a low debt-to-income ratio will maintain Title IV eligibility, while schools that fail one test will be considered restricted, unless the school exhibits a high repayment rate. *Id.*

262. *Id.* (the calculation includes payments from students who have not graduated and considers discretionary income as well as actual income). The proposed regulation provides that payments must be less than eight percent of income "or twenty percent or less of discretionary income" in order to meet the test. *Id.*

263. *Id.*

264. *Id.* A school with a repayment rate of at least forty-five percent would be considered eligible for Title IV funding, while a school with less than thirty-five percent would be ineligible. *Id.*

265. Press Release, U.S. Dep't of Educ., Department on Track to Implement Gainful Employment Regulations; New Schedule Provides Additional Time to Consider Extensive Public Input (Sept. 24, 2010), available at <http://www.ed.gov/news/press-releases/department-track-implement-gainful-employment-regulations-new-schedule-provides->.

266. Tamar Lewin, *Scrutiny and Suits Take a Toll on For-Profit College Company*, N.Y. TIMES, Nov. 10, 2010, at A1, available at 2010 WLNR 22437213. The Washington Post Company, owner of Kaplan University, singlehandedly spent \$350,000 on lobbying efforts during the third quarter of 2010. *Id.* Under the proposed regulations, Kaplan would face adverse action by the DOE, as seventy-two percent of Kaplan students are currently in default. *Id.*

transparency from for-profit schools and seek to rein in misrepresentation and reduce unmanageable student debt.

To some extent all institutions of higher education are “for-profit,” but as discussed above, the primary goal of for-profit colleges is financial gain.²⁶⁷ Administrators and shareholders of for-profit schools seek to profit personally from the educational endeavor.²⁶⁸ Over the past two decades, publicly traded for-profit institutions have emerged as the most visible and consequential players in the proprietary education industry.²⁶⁹ These schools face the additional pressure of meeting the expectations of Wall Street and for many years were the darlings of the Street.²⁷⁰ For-profit schools function as a business. Instead of selling widgets, they sell the promise of a better future, doing whatever is necessary to achieve annual enrollment and profit goals.

To meet financial goals, schools have resorted to fraud and misrepresentation, in violation of their PPAs with the DOE. Schools work the federal student loan system by fraudulently managing student data, and deceiving students into enrolling by inflating career prospects and misstating program costs. Additionally, schools model their admission representatives’ pay after a traditional sales environment, where compensation is tied to enrollments. While many of the players in the industry provide students with a beneficial educational experience, the bad actors draw attention and scrutiny to the sector.

Undercover investigations conducted by the GAO exposed first-hand instances of fraud and misrepresentation.²⁷¹ Similarly, three Senate hearings showcased anecdotal evidence of financial aid manipulation, misrepresentation of program costs and accreditation, and flagrant violations of the incentive compensation ban. These deceptive practices, the high debt levels of for-profit students, and increased student loan default rates prompted the DOE’s new Program Integrity and Gainful Employment rules. Only time will tell if these new rules will finally curtail the abuses seen in the for-profit education sector.

267. RICHARD RUCH, *HIGHER ED, INC.* 92 (2001).

268. *Id.* at 13–14, 92.

269. *Id.* at 2–4.

270. See Joshua Woods, *Opportunity, Ease, Encouragement, and Shame: A Short Course in Pitching For-Profit Education*, *CHRON. OF HIGHER EDUC., THE CHRON. REV.*, Jan. 13, 2006, at 10.

271. *Undercover Testing finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 2 (Aug. 4, 2010 revised Nov. 30, 2010) (statement of Gregory D. Kuntz, Managing Director Forensic Audits and Special Investigations, U.S. Government Accountability Office), available at <http://www.gao.gov/new.items/d10948t.pdf>.

Congress believed the 1992 Higher Education Amendments would curb the destructive behavior of the for-profit colleges. But rather than fixing the issues, the DOE altered their rules, creating ambiguity in the administration of the policies. In response to increased regulation, schools devised new methods to manipulate the federal student aid programs. Further amendments in 1998, 2005, and 2008 sought to contain these behaviors while offering the for-profit industry conciliatory measures such as increasing the Title IV revenue threshold from eighty-five percent to ninety percent, and eliminating the online education restriction. In spite of these actions, the fraudulent practices continued.

Complaints to the DOE by students, *Qui Tam* suits, and shareholder derivative suits have accelerated over the past ten years. The DOE investigators and state Attorneys General find it difficult to prosecute or investigate the large number of complaints filed against the for-profits.²⁷² And in instances when actions are brought against for-profit colleges, the victories are Pyrrhic.

Schools quickly offer to settle claims, agreeing to pay fines in return for the DOE looking the other way. Though payment of penalties may impact a school's financial statement, they do not change the practices of the institution. The DOE is authorized to revoke or suspend an institution's access to Title IV funding but is reluctant to do so. A publicly traded school with profits rivaling major financial services and manufacturing companies can easily absorb multi-million dollar fines but would face disaster if the DOE withheld Title IV funding.²⁷³

It is understandable that the DOE refrains from causing financial collapse of a major corporation. This ineffective enforcement needs to be addressed and the DOE must adopt policies that provide consequences for regulatory and statutory violations. The proposed Gainful Employment provisions suggest denial of funding for individual programs at schools that do not meet the debt-equity ratio or consistently fall below the forty-five percent repayment rate. If enacted and enforced, this could provide actual consequences to programs that fail to deliver worthwhile education. Perhaps it is because these regulations, as proposed, will actu-

272. See *Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 5-6 (June 24, 2010) (testimony of Kathleen S. Tighe, Inspector General, U.S. Department of Education), available at <http://help.senate.gov/imo/media/doc/Tighe.pdf>.

273. See Joshua Woods, *Opportunity, Ease, Encouragement, and Shame: A Short Course in Pitching For-Profit Education*, CHRON. OF HIGHER EDUC., THE CHRON. REV., Jan. 13, 2006, at 10 (comparing the earning of the largest for-profit college with Oracle). There are many stories of large companies making decisions to violate laws or regulations cognizant of the fines that may be assessed. In business, this is considered an informed decision, where penalties or lawsuits will cost less in the long run than compliance with the law in question.

ally affect schools, that the DOE has gone back to the negotiation table, bending from lobbying pressure on the Hill.

If the DOE significantly weakens the proposed regulations or fails to pass any significant default and debt guidelines, all will not be lost. The structures established in the new regulations concerning Gainful Employment and Program Integrity remedy the prior ambiguity of the regulations, but alternate mechanisms of enforcement should still be considered. Statutory creation of an independent cause of action, and a definitive decision that PPAs are enforceable under the False Claims Act would place increased pressure on schools.

Another option that would penalize schools, without devastating the business model, is the instatement of partial Title IV funding revocation rather than requiring payment of lump sum fines. By adopting a procedure in which schools found in violation of DOE regulations receive a temporary loss of funding for new students only—with the ability for students to receive retroactive payments if violations are fixed within a given time—the DOE will be able to impact the bottom line of the institutions while putting the schools in control of their continued viability. This option would impact the schools without causing bankruptcy.

The goal of all parties involved in the crafting of the Program Integrity rules is to provide protection for low-income students seeking a way to improve their lives through education. The challenge is balancing the need to protect students without destabilizing what has become a significant industry. The DOE's Program Integrity rules provide transparency that will give students the information necessary to make informed decisions. If schools follow the new regulations, students will have the ability to take control of their educational decisions and will be less likely to succumb to predatory practices. With the attention of schools diverted from aggressive tactics, hopefully they will turn their attention to their most important job: education.²⁷⁴

274. Although no one is sure if the new Program Integrity rules will actually make a difference in the way for-profit colleges are run, the publicity surrounding the issue has already severely impacted the industry's key players. UOP reported a potential forty percent decline in enrollments between the Fall of 2010 and 2011. Goldie Blumenstyk, *As For-Profit Colleges' Enrollment Growth Slows, Analysts See Signs of an Industry Reset*, CHRONICLE OF HIGHER EDUC., Nov. 11, 2010, available at <http://chronicle.com/article/For-Profit-Colleges-May-Be-at/125379/>. Strayer Education is admitting to a two percent decline in students. *Id.* Most illustrative is the fact that Corinthian Colleges lowered their earnings forecast by over twenty cents a share and made reductions to their workforce. *Corinthian Colleges*, BOS. GLOBE, Feb. 2, 2011, at 10, 2011 WLNR 2061806.